88-119

Supreme Court, U.S.
FILED
JUL 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

# Supreme Court of the United States

October Term, 1987

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**HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY, INC.**

**Petitioners,**

**vs.**

**REDKEN LABORATORIES, INC.,**

**Respondent,**

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

Judge Barbara K. Hackett, District Judge, Eastern District of Michigan, found the Petitioner in Contempt of Court for violating a permanent injunction which prohibited the Petitioner from selling Respondent's products marked "For Professional Use Only." The only evidence which the Respondent produced during the Show Cause Hearing was a single witness who purchased 8 bottles of Respondent's hair care products at Petitioner's 2 stores. Without proof of damages, Judge Hackett awarded the Respondent $25,000 damages, ordered the Petitioner to post a $25,000 bond and pay the Respondent's costs and attorney fees. The District Court did not set a term or conditions for the return of the bond and made no determination as to the Petitioner's financial ability to procure the bond.

A Panel of the Sixth Circuit Court of Appeals affirmed the judgment of the District Court on the grounds that the award of damages was in accord with a bond set by another District Judge nearly 10 years earlier which was returned to the Petitioner 15 months after the bond issued. The Panel further held, without proof of actual damages, that the $25,000 bond of ten years earlier was a determination by the District Judge of the damages from a violation of the injunction.

The questions presented are:

1. After a finding of civil contempt for violating a permanent injunction, may a District Court impose sanctions against the contemnor without an evidentiary

hearing on damages and a determination of the financial ability of the contemnor without violating the contemnor's right to due process under the Fifth Amendment to the Federal Constitution?

2. Does the Federal Constitution require a District Court to apply State law in imposing sanctions for the violation of a permanent injunction issued in a diversity of citizenship action involving state claims?

3. Does the District Court's award of damages violate the Petitioner's right to Due Process under the Fifth Amendment to the Federal Constitution?

4. Did the Show Cause Hearing of the District Court comply with the Petitioner's right, under the Fifth Amendment to the Federal Constitution, to a fair hearing?

5. Does the decision of the Sixth Circuit Panel overlook, misconstrue and misapprehend material facts?

## PARTIES

The Petitoner Herb Levin is the owner of two retail stores, namely, Levins Beauty Supply, Inc. in the City of Oak Park, Michigan and Levins of West Bloomfield, Inc. in the City of West Bloomfield, Michigan. All of Petitioner's retail business is conducted in the State of Michigan. The Petitioner's stores sell beauty care products to the public. The Respondent Redken Laboratories, Inc. is a manufacturer of beauty care products. Respondent's principal place of business is in the State of California.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

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HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, and
LEVIN BEAUTY SUPPLY, INC.

Petitioners,

vs.

REDKEN LABORATORIES, INC.,

Respondent,

---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

The Petitioner respectfully prays that a writ of certiori issue to review a decision of a panel of the Court of Appeals for the Sixth Circuit affirming a judgment of the U.S. District Court, Eastern District of Michigan, Southern Division, which awarded Respondent $25,000 money damages, actual costs and attorney fees and

ordered the Petitioner to post a $25,000 bond in favor of the Respondent.

## OPINIONS BELOW

The Order and Opinion of the District Court is annexed as Appendix D and is reported in 843 F2d 226 (1988). The decision of the Court of Appeals Panel which denied Petitioner's Petition for a Rehearing is annexed as Appendix I.

## JURISDICTION

The Order of the Court of Appeals Panel denying the Petitioner's request for a rehearing en banc of the Panel's decision which affirmed the Judgment of the District Court was entered on May 16, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## STATEMENT OF THE CASE

**Summary**

In 1977, the Petitioner consented to a judgment which permanently enjoined the Petitioner from selling the Respondent's products marked "For Professional Use Only". On March 25, 1987, during a Show Cause hearing, the Petitioner was found to have violated the injunction, and without an evidentiary hearing or a proof of damages, the Petitioner was ordered to pay the Respondent $25,000 and post a $25,000 bond. The bond was set by the District Court without regard to a prior

determination of the Petitioner's ability to post the bond or an inquiry into the extent of damages in the event of a violation of the injunction. In an opinion containing errors of fact and facts not of record, a Sixth Circuit Panel affirmed the judgment of the District Court.

## FACTS AND PRIOR PROCEEDINGS

In 1977, Respondent sued the Petitioner under diversity of citizenship alleging that the Petitioner had engaged in unfair competition by selling Respondent's goods marked "For Professional Use Only". All counts of the Complaint were state counts.

On June 10, 1977, a consent judgment was entered without damages permanently enjoining the Petitioner from selling the Respondent's products marked "For Professional Use Only". The judgment did not enjoin the Petitioner from selling the Respondent's retail products and the Petitioner continued to sell the retail products after the entry of the judgment. Three and one half months later, on September 27, 1977, Judge Ralph B. Guy, Jr., District Judge, Eastern District of Michigan, held that the Petitioner violated the injunction and ordered the Petitioner to pay $350 costs and post a $25,000 bond in favor of the Respondent. There is no record to show that damages were caused by the violation. Fifteen months later, on January 10, 1979, Judge Guy returned the bond. When Judge Guy returned the bond he said:

> "THE COURT: Very well, the Court is going to make this disposition in this matter.
>
> "It is going to allow the return of the bond money to the defendant.
> The Court feels that there has been a sufficient penalty suffered to cover the initial breach."

Judge Guy also said:

> "Secondly, the violation of the injunction initially so soon after its issuance was egregarious conduct on the part of the defendant. And if there was any repetition of that you could expect to be dealt with very harshly by this court insofar as contempt citations because you had one bite of the apple, and anything further would be construed as complete, purposeful and wilfull disregard and disdain of the lawful orders of this Court and would be dealt with accordingly."

Eight years later, Respondent's local distributor and the supplier of Respondents retail goods, without order, shipped some of the prohibited goods to the Petitioner. Unbeknown to the Petitioner, his clerks stocked them on the open shelves with thousands of other products. The appearance of the prohibited goods was deceptively similar to the retail goods which

Petitioner continuously sold the retail product for more than ten years and the trademarks and names of the products were identical. The only difference was of size and the words "For Professional Use Only" in small letters on the lower margins of the probibited products.

On January 9, 1987, on information from salon operators that the prohibited goods were in the Petitioner's stores, Respondent dispached its Contract Compliance Manager, Robert Allen, by aircraft from California to Michigan. The following day, January 10, Allen purchased a total of 8 bottles of hair shampoo, hair conditioner, and hair wave set. The following month, Petitioner was served with an Order to Show Cause, ordering the Petitioner to appear in Court for a hearing on March 25, 1987. A response was filed containing side-by-side comparisons of the retail and prohibited products to show the court that their appearances were deceptively similar. Also in the Response were Affidavits from the store managers stating that the goods were shipped to the stores without their order.

Respondent produced only a single witness, Robert Allen. Allen testified that the only investigation he made consisted of a telephone contact with one distributor the day before the hearing. The only evidence relating to the violation of the injunction was the 8 bottles of hair shampoo, hair conditioner and wave set which Allen purchased at Petitioner's stores. No testimony or other evidence was produced to substantiate Respondent's claim for damages. When Allen was questioned about damages, Allen answered:

BY MR. RHODES

> Q. Mr. Alan, insofar as damages, have you determined the extent of damages that Redken has suffered because of these sales?
>
> A. That's not my job function there, so, no, I have not."

Over the objections of Petitioner's attorney, the Court admitted a blank Distributor Agreement and a Policy Statement which were not previously disclosed to the Petitioner or his attorney. The documents threatened the distributors with a loss of distributorships for sales of either the retail or professional products to businesses other than salons. The Court allowed Respondent to use these documents for falsely representing that the Petitioner intentionally procured the prohibited goods from the "diversionary market".

The Petitioner attempted to defend himself against these false representations by offering into evidence invoices from Respondent's local distributor who supplied the Petitioner with the retail goods. The Court refused to admit the Petitioner's invoices on the grounds the invoices were incomplete. When Petitioner's counsel requested permission to bring the managers to court, the Court did not grant the request. Notwithstanding there was no showing of damages, at the conclusion of the hearing the Court said:

> "I'm awarding at this time $25,000 to the petitioner [Redken]. And I'm further

> reinstating the earlier $25,000 bond. That's a must. There's the award, plus a $25,000 bond to assure future compliance with the injunction which remains in place.
>
> The Court will award attorney fees, costs and expenses involved in bringing this motion."

The District Court did not set a time period for the bond or conditions for the return of the bond. Moreover, no determination was made as to the ability of the Petitioner to finance the bond. The Petitioner filed a request for reconsideration which the District Court denied. Appeal was taken.

On March 29, 1988, a Sixth Circuit Panel affirmed the judgment of the District Court in a decision which contained errors of fact and facts not of record.

## REASONS FOR GRANTING THE WRIT

### I.

**THE IMPOSITION OF CRIMINAL SANCTIONS AFTER A FINDING OF CONTEMPT WITHOUT AN EVIDENTIARY HEARING VIOLATES THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.**

The words, "due process of law", Justice Curtis said in *Murray's Lessee et al V. Hokoken Land and Improvement Co.*, 18 Howard 272 (1855), "were undoubtedly intended to convey the same meaning as

the words, 'by the law of the land,' in Magna Charta". . . . The article [Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the goverment. . "

In *Holden v. Hardy,* U.S. 366 (1897), citing Justice Miller in Davidson v. New Orleans, 96 U.S. 97, 8 the Court said, the "law of the land" implies a conformity with the "ancient and customary laws of the English people" and that the phrase "due process of law" . . . "forbid that one man's property, or the right to property, shall be taken for the benefit of another, or the benefit of the state, without compensation;" It is clear that the awarding of $25,000 to the Respondent without an evidentiary hearing or proof of damages was a flagrant violation of the Fifth Amendment to the Federal Constitution.

In *United States v. United Mine Workers of America*, 330 U.S. 258 (1946), this Court set standards for imposing sanctions on contemnors after a finding of civil contempt. The Court said that sanctions could be employed to either compensate the complainant or coerce the defendant into compliance with the Court's order. The Court said that where compensation is payable, it must be based on actual loss and where the purpose is to make the defendant to comply, it must consider the character and magnitude of the harm threatened and the effectiveness of the sanction in bringing about the desired result. It is clear that neither the District Court or the Court of Appeals applied these standards. Not only had thee been complete compliance with the injunction over a long period, the violation was

inadvertent and the Petitioner had come to Court to show the Court that there was no intent to violate the Court's order.

The Panel's ruling that the $25,000 award to the Respondent was in accord with the District Court's determination 10 years earlier when the Petitioner was ordered to post a $25,000 bond as an approximation of damages for a violation of the injunction is a misstatement of fact. The original action terminated with a consent judgment. There is nothing in the record to show that an evidentiary hearing on damages was held either prior to the entry of the consent judgment or when Petitioner was held to have violated the injunction three months later. When Judge Guy returned the bond 15 months later, he said 'There has been a sufficient penalty suffered to cover the initial breach.'The Court's sanctions are arbitrary, excessive and in no way related to the evidence adduced in Court. There is no evidence of damages because the injunction was violated. The only evidence relating to the violation was the sale of 8 bottles of the Respondent's hair shampoo, hair conditioner and wave set. Judge Hackett was of the opinion at the Show Cause Hearing that the $25,000 damages was appropriate because the injunction was violated.

When Respondent's only witness Robert D. Allen was questioned about damages, Allen answered:

BY MR. RHODES

Q. Mr. Alan, insofar as damages, have you determined the extent of damages

> that Redken has suffered because of these sales?
> A. That's not my job function there, so, no, I have not."

No consideration was given to Petitioner's strict compliance with the injunction for almost 10 years before the 1987 violation. In *General Signal Corp v Donallco, Inc.*, 787 F2d 1376, (6th Cir 1986), the 6th Ciruit said "substantial compliance with a court order is a defense to civil contempt". In *Tobin v Alma Mills*, 192 F2d 133 (1951), the 4th Circuit held that a 10 year observance of an injunction without substantial violation rendered prospective enforcement of the injunction inequitable.

The Sixth Circuit Panel was of the opinion that the $25,000 damages was in accord with the $25,000 bond of District Judge Guy which was returned and cancelled eight years before the violation occurred. The Sixth Circuit Panel's decision disregarded Judge Guy's comment when the Bond was returned after fifteen months, i.e., "there has been sufficient penalty suffered to cover the initial breach".

## II

**THIS COURT SHOULD DECIDE WHETHER THE FEDERAL CONSTITUTION REQUIRES A DISTRICT COURT IN A CONTEMPT PROCEEDING TO APPLY STATE LAW IN IMPOSING SANCTION FOR THE VIOLATION OF A PERMANENT INJUNCTION ISSUED IN A DIVERSITY OF CITIZENSHIP ACTION INVOLVING STATE CLAIMS**

This case raises the constitutional issue of whether the Federal Constitution requires a District Court in a contempt proceeding to apply the substantive law of the forum state in imposing sanctions for the violation of a permanent injunction which issued in a diversity of citizenship District Court action involving state claims.

Over fifty years have passed since this Court handed down its landmark decision, *Erie Co. V. Tompkins*, 304 U.S. 64 (1938), wherein the Court held that except to matters governed by the Federal Constitution or Acts of Congress, the substantive law to be applied was the law of the state.

The District Court Action which resulted in the permanent injunction was brought by the Respondent in 1976 under diversity of citizenship and involved only state claims and sales which were confined to Michigan. The consent judgment entered in 1977 which enjoined the Petitioner from selling the Respondent's goods marked "For Professional Use Only" was based on a State count of unfair competition. If the case would have terminated with a trial on the merits, Respondent's recovery would have been decided by the substantive laws of Michigan relating to unfair competition. Under Michigan law, Respondent would not have been entitled to damages except upon a finding that the Petitioner was guilty of contempt, that the misconduct had caused actual loss or injury, and the amount of injury. *Montgomery v. Booming Co.*, 104 Mich 411 (1895).

Article X of the Federal Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 1652 of Title 28, United States Code, provides that "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The fact that the Federal Courts pay little heed to *Erie v. Tompkins*, Supra and 28 USC 1652, is evident from the decision of the Sixth Circuit Panel wherein it is said:

> "this case represents the proper issuance and enforcement of an injunction under Rule 65(a) against an identified party who has continued to injure another's legislatively protected and registered rights and property."

Would not the Constitution be better served if this Court would grant Certiorari and decide this issue?

## III

**THE DISTRICT COURT VIOLATED THE PETITIONER'S RIGHT TO A FAIR HEARING UNDER THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.**

In affirming the District Court judgment against the Petitioner, the Sixth Circuit Panel summarily ignored the Constitution and the decisions of the Sixth Circuit governing the due process requirement of a "fair hearing" in a contempt proceeding. In *TWM Manufacturing Company, Inc., v. Dura Corp.*, 722 F2d 1261 (6th Cir., 1983) the 6th Cir. said: "In criminal contempt, willful diobedience must be proved beyond a reasonable doubt. Willfulness, for this purpose, implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." For nearly ten years, the Petitioner had completely complied with the permanent injunction. In view of this alone, the District Court should have been chargeable with the inference of good faith by the Petitioner. The admittance into evidence of the Respondent's blank distributor agreement and policy statement, without prior notice to the Petitioner, was a flagrant violation of the Fifth Amendment right to Due Process. Moreover, the Court allowed the Respondent to use these documents to falsely represent that the violation of the injunction was not inadvertent but rather intentional.

The Court again denied the Petitioner a right to a fair hearing when it refused to admit the invoices of the Petitioner and ignored the request of the Petitioner's counsel to bring the store managers to Court to rebut the false accusations of the Respondent. The Court was apprised that the Petitioner had returned from Florida to Michigan to attend the Show Case. Is the Constitutional right to a fair hearing in a contempt proceeding merely within the discretion of a District Judge as the decision of the Panel indicates. We think not. In *Fuentes v.*

Shevin, 407 U.S. 81 this Court said "The constitutional right to be heard is a basic aspect of the duty of the government to follow a fair process of decision making when it acts to deprive a person of his possessions." The Court further said that "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a persons property."

This Court has also said when the issue came before this Court as to what constituted a "fair and open hearing" by a committee of the Appellate Division of the New York Supreme Court for admission to the State Bar, this Court in *Willner v. Committee on Character,* 373 U.S. 95 (1962) said the requirement of fairness required that a party be fairly advised of what was to be heard by the goverment. In *Holt v. Virginia,* 381 U.S. 131 (1964), which involved contempt convictions of two attorneys, this court citing *In re Murchison*, 349 U.S. 133 said a "fair trial in a fair tribunal" is a basic requirement of Due Process. The right to a fair trial is the most basic protection the Constitution offers for preserving its guarantee of Due Process. This Court should not allow so flagrant a violation of this right to pass and grant Certiorari.

## IV

**THE DECISION OF THE SIXTH CIRCUIT PANEL IS GROUNDED ON MISSTATEMENTS OF MATERIAL FACTS AND FACTS NOT OF RECORD.**

The Sixth Circuit Panel's decision omits material facts and contains misstatements of material facts and facts not of record. The first misstatement of fact is that

prior to the 1976 lawsuit, the Respondent granted the Petitioner a contractual right to sell its products. The truth of the matter is that there has never been a contractual relationship, such as a distributorship or dealership, between the Respondent and Petitioner. In 1977, the Petitioner consented to a judgment which enjoined the Petitioner from selling the Respondent's products marked "For Professional Use Only". The judgment did not prohibit the Petitioner from selling Respondent's retail products and he continued to do so with the knowledge of the Respondent after the judgment.

Another misstatement of fact is that the 1976 lawsuit involved the Respondent's trademarks. This was not so. The Petitioner has never violated the Respondent's trademarks by way of infringement, dilution or otherwise. None of the claims in the 1976 lawsuit involved a federal cause of action.

An assertion of fact not of record is that when Judge Guy returned the Petitioner's bond in 1979, he noted that the Respondent had reasonable concerns that they could be exposed to potential liability with the possible misuse of the product by nonprofessionals.

The decision of the Panel omits the fact that when Judge Guy returned the bond in 1979, he said there has been a sufficient penalty to cover the initial breech. Instead the decision states that the $25,000 bond in 1979 was a determination by the Court of an approximation of damages in the event the injunction was violated.

Another misstatement of fact is that the Court warned the Petitioner that if he failed to identify the Redken distributors who supplied his stores with products, it would affect the credibility of his defense and testimony. The decision fails to disclose that what the Petitioner was asked to do was to furnish Respondent's attorney with an affidavit listing all of the distributors who sold Levin Redken products since 1977. Since the Petitioner had not purchased any of the prohibited products since 1977, other than what was shipped in 1987 without order, this would have meant disclosure of the sellers of Redken's retail products which the injunction did not enjoin. After the Respondent disclosed its distributor agreement at the Hearing which threatened termination of distributorships for sales of the retail products, Petitioner was concerned that Respondent would retaliate against these distributors who sold him other products and injure his business relationships.

The decision omits the fact that the sales invoices which Petitioner offered into evidence were supplied by Redken's distributor, bore the names and address of the distributor and some were numbered. Respondent's distributor agreement provided Respondent with a right to audit a distributor's records. The Petitioner's attorney requested the opportunity to bring the store managers to Court but the Court ignored the request.

## CONCLUSION

More than ten years ago, the Petitioner, a small independent retailer, stipulated to the entry of a consent

judgment which permanently enjoined the Petitioner from selling the Respondent's beauty products marked with the words "For Professional Use Only". After total compliance with the injunction for nearly 10 years, the Petitioner has been adjudged guilty of criminal contempt and assessed an excessive fine and ordered to post a substantial bond of an indefinite term and indefiniteconditions for its return other than compliance with a permanent injunction.

Moreover, constitutional issues exist with regard to whether State law should have been applied in imposing sanctions for the violation and whether the Petitioner was denied the due Process he was entitled to before the seizure of his property.

This Court should grant certiorari, restore the Petitioner's property, and provide additional guidance to the District Courts for contempt proceedings so that will not be brought and citizens will not be deprived of the due process guarantees of the Federal Constitution.

Respectfully submitted,

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Dated: July 13, 1988

## APPENDIX A - FINAL JUDGMENT DATED JUNE 10, 1977

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

REDKEN LABORATORIES, INC.,
Plaintiff,

v

Civil Action No. 671406
Ralph B. Guy, Jr.

HERB LEVIN, dba LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY INC., a Michigan corporation,

Defendants.
_____/

**FINAL JUDGMENT**

Based upon the Stipulation re Entry of Final Judgment entered into on May 24, 1977 between plaintiff Redken Laboratories, Inc. and defendants Herb Levin, dba Levin Beauty Supply, and Levin Beauty Supply, Inc., and the facts therein stipulated to, it is hereby concluded that defendants have been engaging in all acts of unfair competition alleged in the First Claim of the Complaint on file herein. Therefore, it is hereby ordered:

1. That defendants Herb Levin, individually and doing business as Levin Beauty Supply, and Levin Beauty Supply, Inc., and their agents, servants, employees, and

all persons in active concert or participation with them be and they hereby are, permanently enjoined and restrained from directly or indirectly advertising, offering or sale or selling to any person, firm or corporation whomsoever any products manufactured by plaintiff Redken Laboratories,Inc. and explicitly formulated, designed and labeled "For Professional Use Only" or any products which bear any of plaintiff's trademarks or any reproduction, counterfeit copy or imitation thereof which are explicitly formulated, designed and labeled "For Professional Use Only", and that no monetary damages be assessed against defendant.

2. That the second Claim (including breach of contract) and Third Claim (conspiracy to defraud) of the Complaint on file herein be dismissed with prejudice.

3. That the Counterclaims of Defendants on file herein be dismissed with prejudice.

Dated: June 10, 1977.

RALPH B. GUY, JR.
United States District Judge

## APPENDIX B - ORDER TO POST BOND DATED OCTOBER 12, 1977

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

REDKEN LABORATORIES, INC.

Plaintiff,

v

.Civil Action
No. 6-71406

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,

Defendants.

**ORDER**

This motion came on for hearing before the Court, Honorable Ralph B. Guy, Jr., District Judge, presiding, on September 27, 1977, and the Court having duly heard and considered the evidence and the arguments presented by the attorneys representing the parties, having read and considered the briefs submitted by the parties, and the Court having filed an opinion wherein its findings and conclusions appear, and having found that defendant has violated the permanent injunction of this Court,

IT IS ORDERED,

that the defendant, Herb Levin, d/b/a Levin Beauty Supply and Levin Beauty Supply, Inc., is:

adjudged in contempt of this Court;

to pay to plaintiff, Redken Laboratories, Inc., costs in the amount of $350; and

to post a bond in the amount of $25,000 to the benefit of plaintiff, Redken Laboratories, Inc., within thirty days from the date of this order, conditioned upon defendant's not in the future violating the terms of the permanent injunction heretofore issued against defendant on June 10, 1977, enjoining defendant from selling any Redken "Professional Use Only" products.

Dated at Detroit, Michigan, this 12th day of October, 1977.

RALPH B. GUY, JR.
Federal District Judge

APPROVED AS TO FORM:

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Attorneys for Plaintiffs

## APPENDIX C - TRANSCRIPT OF JANUARY 10, 1979 HEARING ON MOTION TO RETURN BOND

Detroit, Michigan
Wednesday, January 10, 1979
P. M. Session

- - -

* * * * *

THE COURT: Very well, the Court is going to make this disposition of this matter.

It is going to allow the return of the bond money to the defendant.

The Court feels that there has been a sufficient penalty suffered to cover the initial breach.

I have no hesitancy whatsoever in, first of all, reminding both sides that there is a permanent injunction, and that gives the plaintiffs ready access to this Court at any time simply by seeking a show cause why the defendant shouldn't be held in contempt of the injunction. And in such matters, the Court would certainly expedite its hearing and treatment.

Secondly, the violation of the injunction initially so soon after its issuance was egregious conduct on the part of the defendant. And if there was any repetition of that, you could expect to be dealt with very harshly by this Court insofar as contempt citations because you had your one bite of the apple, and anything further would be construed as complete purposeful and wilfull disregard and disdain of the lawful orders of this Court and would be dealt with accordingly.

So I am going to allow you to get your bond back. But you had better tell your client that he absolutely will have to follow that injunction to the letter, or he will be in serious trouble.

Thank you, gentlemen.

MR. COHEN: Thank you, your Honor.

THE COURT: You will have to, of course, present an order to have the bond returned.

MR. COHEN: Thank you.

- - -

CERTIFICATE

I, Marian L. Olden, Official Court Reporter, do hereby certify that I reported in stenotype the foregoing proceedings had in open court in the within-entitled matter before the Honorable Ralph B. Guy, Jr., United States District Judge, at Detroit, Michigan, on Wednesday, January 10, 1979, and that the foregoing transcript, consisting of three (3) typewritten pages, constitutes a full, true and correct transcript of an excerpt of my said stenotype notes.

Marian L. Olden, R.P.R. - C.S.R.

Dated: Detroit, Michigan
January 18, 1979

## APPENDIX D - OPINION AND ORDER DATED MARCH 27, 1987

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

REDKEN LABORATORIES, INC.,
Petitioner,

v.

CASE NO. 76-CV-71406-DT
HON. BARBARA K. HACKETT

HERB LEVIN, d/b/a LEVIN
.BEAUTY SUPPLY, INC.
and LEVIN BEAUTY SUPPLY,
a Michigan corporation,
Respondents.

_____/

OPINION AND ORDER

This matter is before the court on petitioner Redken Laboratories' request for an order to show cause why respondents, the defendants in this action, Herb Levin and various business names and corporations under which Mr. Levin operates, should not be held in contempt of a June 10, 1977, injunction of this court which in substance enjoined Mr. Levin and those business enterprises from selling at retail any Redken Laboratory products which were designated "For Professional Use Only."

Petitioner's motion was heard by the court on March 25, 1987. The court had heard and consideredthe evidence and the arguments presented by attorneys

representing the parties. The court, further, has read and onsidered the briefs submitted by the parties and the record and has heard the testimony of Mr. Robert D. Allen, witness for plaintiff, and Mr. Herb Levin, witness on his own behalf and on behalf of the other defendants and has observed the demeanor of the witnesses and formed an opinion as to the credibility of their testimony.

he court finds by clear and convincing evidence that respondents have violated this court's permanent injunction entered in this action on June 10, 1977. The court further finds that defendant, Herb Levin, is responsible for those violations because he remains the owner of the defendant business and corporations through the managers. Accordingly,

IT IS ORDERED that the defendants are to pay to plaintiff, Redken Laboratories, Inc. an award of $25,000.00 for damages, plus actual attorney's fees, the expenses associated with bringing this matter before this court and costs; and,

IT IS FURTHER ORDERED that the defendants are to post a bond in the amount of $25,000.00 to the benefit of plaintiff, Redken Laboratories, Inc., within thirty (30) days from the date of this order, conditioned upon defendants not in the future violating the terms of the permanent injunction heretofore issued against defendants on June 10, 1977, enjoining defendants from selling any Redken "Professional Use Only" products.

s/Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: March 27, 1987

## APPENDIX E

## OPINION DENYING MOTION FOR RECONSIDERATION DATED APRIL 21, 1987

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

REDKEN LABORATORIES, INC.,

Petitioner,

v.

CASE NO. 76-CV-71046-DT
HON. BARBARA K. HACKETT

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,

Defendants.

---

ORDER DENYING MOTION FOR RECONSIDERATION

On March 27, 1987, this court entered an opinion and order, finding the respondents in violation of the court's permanent injunction dated June 10, 1977, which enjoined respondents from selling at retail any of petitioner's products designated "For Professional Use Only." The matter is presently before the court on respondents' motion for rehearing, pursuant to Local Rule 17(m).

## Appendix E

Respondents assert in their present motion that petitioner misrepresented to the court the source of professional use products sold by respondents and that respondents had no notice that the source of such items would be addressed at the hearing. Respondents further assert that they were unaware of the presence of the professional use items in their stores.

Respondents' present motion is governed by Local Rule 17(m), which provides in pertinent part:

> Generally and without restricting the discretion of the court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

In this case a full hearing was conducted in open court on the order to show cause initiated by petitioners. The court notes that respondents had ample notice of the purpose of the hearing and ample opportunity to produce witnesses. Respondents raise no new issues at this time. Accordingly,

IT IS ORDERED that respondents' motion for rehearing is denied.

s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated April 21, 1987

APPENDIX F - DECISION OF THE COURT OF APPEALS FILED MARCH 29, 1988

No. 87-1363

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

---

REDKEN LABORATORIES, INC.,
*Petitioner-Appellee,*

v.

HERB LEVIN d/b/a Levin Beauty Supply and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,
*Respondents-Appellants.*

ON APPEAL from the United States District Court for the Eastern District of Michigan.

---

Decided and Filed March 29, 1988

---

Before: KEITH, MARTIN and RYAN, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Herb Levin, who does business as Levin Beauty Supply and Levin Beauty Supply, Inc., appeals an order prohibiting the sale of trademarked products and requiring Levin to pay Redken Laboratories, Inc. $25,000 in damages for violation of a permanent injunction, attorneys fees incurred by Redken in obtaining the order, and further requiring Levin to post a $25,000 bond for the benefit of Redken. The bond is conditioned upon Levin's future compliance with the permanent injunction.

Levin argues on appeal that the district court committed error when it: (1) refused to admit into evidence Levin's

"sales slips;" (2) admitted into evidence Redken's standard distributor agreement and professional services policy statement; (3) ruled that Levin's refusal to identify Redken distributors who had supplied Levin with Redken products was relevant; (4) decided to impose sanctions; and (5) imposed sanctions that were excessive and contrary to law. After a review of the relevant facts, we will address these contentions in order.

This case has its origins in 1976 when Redken sued Levin for unauthorized sales of Redken products. At that time, Redken also sought a permanent injunction prohibiting Levin from selling Redken products. Prior to that date, Redken had granted to Levin a contractual right to sell its products. These products, which were generally sold only in barber shops or beauty parlors, carried the Redken trademark and were properly registered under federal trademark laws. Redken could exercise complete control as to sales of these products. Furthermore, Redken could restrict its distributors from selling particular products to certain types of customers.

On May 24, 1977, Levin and Redken stipulated that all the facts in Redken's first claim against Levin were true. These facts were incorporated into the final judgment entered by the district court on June 10, 1977.

The stipulated Order stated that Levin had engaged in unfair competition by selling Redken "For Professional Use Only" products to the general public. The district court permanently enjoined Levin from advertising, offering for sale, or selling such products.

On October 12, 1977, Levin was found by the district court to have violated the permanent injunction. The court noted at that time that Redken not only had legitimate business reasons to seek the enforcement of the injunction, but they also had reasonable concerns that they could be exposed to potential liability with the possible misuse of the product by nonprofessionals. As a result, Levin was ordered to post a

bond of $25,000 for the benefit of Redken. The bond was "conditioned upon his [Levin's] not in the future violating the terms of this injunction or selling any Redken "Professional Use Only' products."

Slightly more than one year later, Levin successfully moved the district court for the return of the bond. On January 10, 1979, the district court granted Levin's motion, but warned Levin that:

> if there was any repetition of that [violation of the permanent injunction] you could expect to be dealt with very harshly by this court insofar as contempt citations because you had your one bite of the apple, and anything further would be construed as complete and purposeful and willful disregard and disdain of the lawful orders of this court and will be dealt with accordingly.

Despite the stern advice of the district court, Levin again violated the injunction in January 1987. On January 6, 1987, Robert D. Allen, Contract Compliance Manager for Redken, visited two stores owned by Levin. At the Levin Beauty Supply, Allen found Redken "For Professional Use Only" products for sale to the general public and was able to purchase four such products. That same day, Allen visited Levin Beauty Supply Outlet in West Bloomfield, Michigan, where he also found Redken "For Professional Use Only" products for sale to the general public. He again purchased four such products.

Because of what Allen had found, Redken petitioned the district court for an order to show cause as to why Levin should not again be held in contempt for violation of the permanent injunction. Redken's petition was granted and on March 25, 1987, a show cause hearing was held. Levin did not dispute that they had sold "For Professional Use Only" products in violation of the injunction. Rather, Levin attempted to argue that the products appeared on their

shelves inadvertently because of the negligence of Redken distributors who had incorrectly shipped to Levin the wrong products. The district court apparently disbelieved Levin's explanation and found Levin to have violated the permanent injunction and to be in contempt. Redken was awarded $25,000 in damages, plus its expenses in actual attorney's fees associated with obtaining the Order. Levin was also required to again post a $25,000 bond for the benefit of Redken, conditioned upon Levin's future compliance with the permanent injunction.

Before we turn to the assignments of error raised by Levin in this appeal, we observe that this is not a normal case under Rule 65 where a party was charged with violating an injunction of which he was unaware. Here, Redken early on obtained an injunction because of Levin's unauthorized sales of Redken trademarked and registered products. Levin knew of the injunction and yet continued to engage in their prohibited sale to the general public. Unlike ex parte temporary restraining orders under Rule 65(b), Federal Rules of Civil Procedure, which are often sought to stop the sale of unauthorized trademarked properties, often exacting manifest injustices on innocent and unidentified parties, and which are little tolerated by this court, this case represents the proper issuance and enforcement of an injunction under Rule 65(a) against an identified party who has continued to injure another's legislatively protected and registered rights and property. We turn now to the issues raised by Levin in this appeal.

As part of its defense, Levin sought to prove that it had not ordered "For Professional Use Only" products from any of its sources for Redken products. To accomplish this, Levin attempted to introduce into evidence an incomplete set of undated "sales slips" which did not designate any purported purchaser. We note that for a business record to be admissible under Rule 803(6), Federal Rules of Evidence, the record must satisfy four requirements: (1) it must have been made in the course of a regularly conducted business activity; (2)

it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 (9th Cir. 1984). The sales slips offered by Levin do not come close to meeting these requirements. The sales slips were undated, did not indicate the customer to whom the goods were alleged to have been sold, were not in the custody of an employee charged with keeping the records, and, even more troubling, the defendants admitted that these slips were not all of the slips because "they don't save them all." We believe, therefore, that the district court was fully justified in excluding this evidence.

Levin's second assignment of error is that the district court erroneously admitted into evidence Redken's standard distributor agreement and professional services policy statements pursuant to Rule 403, Federal Rules of Evidence. We note, as an initial matter, that the decision of whether to admit evidence under Rule 403 is placed within the sound discretion of the trial judge. Thus, "a trial judge's ruling will not be overturned unless he has clearly abused his discretion." *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 335 (1986). We believe these documents were not unduly prejudicial and were certainly probative on the question of whether a Redken distributor may have inadvertently shipped the "For Professional Use Only" products. Because these documents demonstrate the consequences a distributor will suffer by shipping professional products to stores such as Levin's, it can be inferred that the distributor will be careful not to inadvertently make such shipments. We do not believe the district court judge abused its discretion in allowing these documents into evidence.

Levin's third assignment of error is that the district court was wrong to consider relevant Levin's refusal to identify Redken distributors who had supplied Levin with Redken products. During cross examination, Mr. Levin was asked the identity of the Redken distributors who had supplied his stores with Redken products since the issuance of the permanent injunction. The district court judge instructed Levin that he did not have to answer the question but warned that failing to do so would affect the credibility of his defense and testimony. Levin declined to answer the question after his counsel's objection to the question had been overruled. We believe this entire line of questioning was relevant, and it was proper for the court to consider Mr.Levin's refusal to answer. We agree with the district court and believe that this line of questioning was relevant to Levin's defense of inadvertent violation of the injunction, wherein he alleges that a Redken distributor caused the violation of the injunction.

Levin assigns as his fourth error the decision of the district court to impose sanctions for his violation of the permanent injunction. As we have noted in the past, "although civil contempt may serve incidentally to vindicate the court's authority, its primary purposes are to compel obedience to a court order and compensate for injuries cause by noncompliance." *Twin Mfg.Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983), *cert. denied*, 107 S. Ct. 183 (1986). We do not believe there is any basis to the argument that the district court abused its discretion in imposing sanctions upon Levin. We also reject Levin's fifth assignment of error, that the sanctions were excessive. Levin has known the consequences of a subsequent violation of the permanent injunction from the time the district court granted Levin's motion for return of the $25,000 bond in 1978. The award of $25,000 to Levin is in accord with the district court's determination nearly ten years ago, when it ordered Levin to post a $25,000 bond, as an approximation of the damages that would be sustained by Redken in the event of Levin violating the injunction. The

award is proper today. We also note that "the award of attorney's fees and expenses to a successful movant may be appropriate in a civil contempt proceeding." *Twin*, 722 F.2d at 1273. Finally, we uphold the decision of the district court ordering Levin to post a $25,000 bond to the benefit of Redken, conditioned upon Levin's future adherence to the permanent injunction. This bond is identical to the one first imposed by the district court in 1977 for violation of the permanent injunction.

For the reasons above, the decision of the district court is hereby affirmed.

## APPENDIX G - CORRECTED PAGE OF COURT OF APPEALS DECISION

Levin's third assignment of error is that the district court was wrong to consider relevant Levin's refusal to identify Redken distributors who had supplied Levin with Redken products. During cross examination, Mr. Levin was asked the identity of the Redken distributors who had supplied his stores with Redken products since the issuance of the permanent injunction. The district court judge instructed Levin that he did not have to answer the question but warned that failing to do so would affect the credibility of his defense and testimony. Levin declined to answer the question after his counsel's objection to the question had been overruled. We believe this entire line of questioning was relevant, and it was proper for the court to consider Mr.Levin's refusal to answer. We agree with the district court and believe that this line of questioning was relevant to Levin's defense of inadvertent violation of the injunction, wherein he alleges that a Redken distributor caused the violation of the injunction.

Levin assigns as his fourth error the decision of the district court to impose sanctions for his violation of the permanent injunction. As we have noted in the past, "although civil contempt may serve incidentally to vindicate the court's authority, its primary purposes are to compel obedience to a court order and compensate for injuries cause by noncompliance." *Twin Mfg.Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983), *cert. denied*, 107 S. Ct. 183 (1986). We do not believe there is any basis to the argument that the district court abused its discretion in imposing sanctions upon Levin. We also reject Levin's fifth assignment of error, that the sanctions were excessive. Levin has known the consequences of a subsequent violation of the permanent injunction from the time the district court granted Levin's motion for return of the $25,000 bond in 1978. The award of $25,000 to Levin is in accord with the district court's determination nearly ten years ago, when it ordered Levin to post a $25,000 bond, as an approximation of the damages that would be sustained by Redken in the event of Levin violating the injunction. The

## APPENDIX H - ORDER DENYING PETITION FOR REHEARING EN BANC FILED MAY 16, 1988

No. 87-1363

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

REDKEN LABORATORIES, INC.,

Petitioner-Appellee,

v. **ORDER**

HERB LEVIN, d/b/a LEVIN BEAUTY, SUPPLY and LEVIN BEAUTY SUPPLY, INC., a Michigan Corporation,

Respondents-Appellants

BEFORE: KEITH, MARTIN and RYAN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

**Appendix H**

The panel has further reviewed the petition for rehearing and concludes that the issues raised in thepetition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

L/S

John P. Hehman, Clerk

Supreme Court, U.S.
FILED
AUG 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

No. 88-119

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, AND LEVIN BEAUTY SUPPLY, INC.,

Petitioners,

v.

REDKEN LABORATORIES, INC.,

Respondent.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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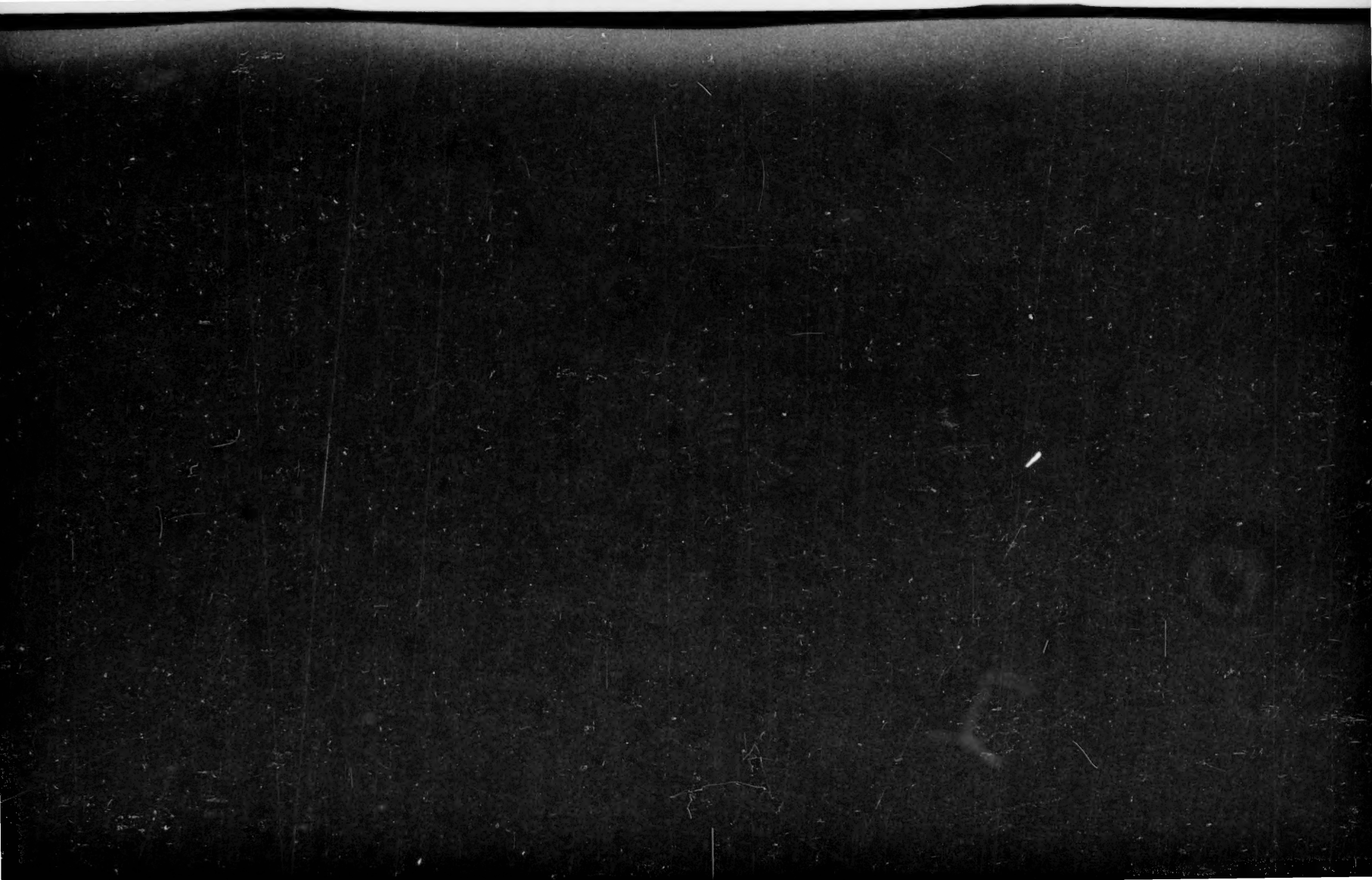

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987
No. 88-119

HERB LEVIN, d/b/a/ LEVIN BEAUTY SUPPLY, AND LEVIN BEAUTY SUPPLY, INC.,
Petitioners,

v.

REDKEN LABORATORIES, INC.,
Respondent.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

On March 25, 1987, Petitioner Herb Levin, d/b/a Levin Beauty Supply and Levin Beauty Supply, Inc. (collectively "LEVIN"), was ordered by the Honorable Barbara K. Hackett, United States District Court Judge for the Eastern District of Michigan (the "District Court"), to pay Respondent Redken Laboratories, Inc. ("REDKEN")[1] an award of $25,000 in damages for violation of a permanent injunction, plus REDKEN's expenses and actual attorneys' fees associated with obtaining the order, and to post a $25,000 bond to the benefit of REDKEN, conditioned upon LEVIN's future com-

[1] REDKEN is not a subsidiary, affiliate or parent corporation of any other corporation.

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the permanent injunction. LEVIN appealed to States Court of Appeals for the Sixth Circuit (the uit"). The District Court's order was affirmed by ircuit. 843 F.2d 226 (6th Cir. 1988). LEVIN now f Certiorari from this Court.

n began in 1976. On July 2, 1976, REDKEN filed t (Appendix I, Count I of Complaint) and requested for money damages due to LEVIN's improper sale N products and a permanent injunction prohibiting n selling REDKEN products.

24, 1977, LEVIN and REDKEN stipulated II) that all the facts in REDKEN's first claim IN were true. The facts in the first claim included:

EN "For Professional Use Only" products are ated and designed solely for resale to licensed ians and barbers, who are educated and trained by EN to select and apply the particular REDKEN ts which are most appropriate for each consumer's hair needs.

oper application of REDKEN products, which is ry to meet the needs of each consumer, is essential nce and maintain REDKEN's goodwill and good

ofessional application of REDKEN "For Pro- al Use Only" products poses a threat to the health fety of consumers, causes REDKEN to suffer product liability exposure and refund claims exper- nd will diminish the goodwill and good name of EN in the eyes of consumers.

EN "For Professional Use Only" products, which mulated, designed and labeled solely for use and tion by licensed professionals, do not bear the and instructions required by the Federal Fair ing and Labeling Act, 15 U.S.C. §1451, *et seq.*, and deral Food, Drug and Cosmetic Act, 21 U.S.C. §301, for products which are sold to the general public. N's sale of these products to the general public t the labels and instructions required by such ion is unlawful. LEVIN's sale of REDKEN "For

Professional Use Only" products which contain coal-tar dyes to the general public renders such products adulterated pursuant to the Food, Drug and Cosmetic Act and makes them subject to seizure by the Food and Drug Administration. By reason of the aforesaid, LEVIN's sale of REDKEN "For Professional Use Only" products to the general public will, if not restrained, subject such products to seizure by the Food and Drug Administration and the publicity attended upon any such seizure or other proceeding by the Food and Drug Administration will severely affect the public's confidence in the quality, safety and efficacy of REDKEN's products and will otherwise endanger REDKEN's goodwill and reputation.

5. REDKEN has suffered actual damages in an amount of not less than $100,000.

Those facts were incorporated into the June 10, 1977, Final Judgment ordered by the Honorable Ralph B. Guy, Jr., who in 1977 was a United States District Court Judge for the Eastern District of Michigan and is now a Judge on the United States Court of Appeals for the Sixth Circuit.

The Final Judgment stated as a finding that LEVIN had engaged in unfair competition by selling REDKEN "For Professional Use Only" products to the public and permanently enjoined LEVIN from advertising, offering for sale, or selling such products. *See* Appendix II.

On October 12, 1977, only four months after the entry of the Final Judgment, LEVIN was found by the District Court to have violated the permanent injunction. At that time, the District Court found that REDKEN had "a legitimate interest in enforcing and seeking to police such injunctions on the basis of business reasons as well as potential liability reasons with the possibility of misuse of the product [REDKEN's "For Professional Use Only" product] by other than professionals" and *ordered LEVIN to post a bond of $25,000.00 for the benefit of REDKEN "conditioned upon his [LEVIN's] not in the future violating the terms of this injunction or selling any REDKEN "Professional Use Only" products."* (Emphasis added).

On December 4, 1978, LEVIN moved the District Court for return of the bond. In LEVIN's brief in support of that motion, LEVIN represented to the District Court that LEVIN had not violated the permanent injunction for a year,[2] that LEVIN would comply with the injunction in the future and that "Defendant [LEVIN] can be trusted to observe the terms of the injunction henceforth."

The District Court granted LEVIN's motion for return of the $25,000.00 bond, but warned LEVIN that *"the violation of the injunction initially so soon after the issuance was egregious conduct on the part of the defendant [LEVIN]. And if there was any repetition* of that *you could expect to be dealt with very harshly by this Court* insofar as contempt citations because you had your one bite of the apple, and *anything further would be construed as complete and purposeful and willful disregard and disdain of the lawful orders of this Court and would be dealt with accordingly."* (Emphasis added.)

On February 6, 1987, REDKEN petitioned the District Court for an Order to Show Cause as to why LEVIN should not once again be held in contempt for violation of the permanent injunction. The District Court granted REDKEN's petition and on March 25, 1987, a Show Cause Hearing was held.

## STATEMENT OF FACTS

In the Petition LEVIN fails to present many facts of Record relevant to LEVIN's arguments and LEVIN has

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[2]Throughout this action and in the Petition LEVIN has stated as a "fact" that if LEVIN was not found by a court to have sold REDKEN "For Professional Use Only" products during a period of time then LEVIN fully complied with the injunction during that period of time. As the District Court and the Sixth Circuit understood, the failure of a court to find a violation of an injunction during a period of time does not establish the "fact" that the contemnor fully complied with the injunction during that period. Similarly, the fact that a driver did not receive any traffic tickets during a period of time does not establish that the driver fully complied with all traffic laws during that period.

stated numerous "facts" that are either misstatements of the Record or else have no support in the Record.[3]

On January 6, 1987, Robert D. Allen, Contract Compliance Manager for REDKEN, visited Levin Beauty Supply in Oak Park, Michigan, found REDKEN "For Professional Use Only" products for sale to the public and purchased four REDKEN "For Professional Use Only" products. On the same day Allen visited Levin Beauty Supply Outlet in West Bloomfield, Michigan, found REDKEN "For Professional Use Only" products for sale to the public and purchased four "For Professional Use Only" products. Robert Allen had come to Detroit from Los Angeles to investigate LEVIN's two stores because REDKEN had received complaints from licensed beauticians and barbers in the Detroit area that REDKEN "For Professional Use Only" products were being sold to the public at those two stores.

LEVIN's response to the Order to Show Cause was that the products had appeared on LEVIN's shelves inadvertently due to the negligence of REDKEN distributors. At the Show Cause Hearing LEVIN did not identify the distributors that shipped the product to LEVIN, no distributors testified, and, in fact, no person with knowledge of the operation of the two stores testified. LEVIN attempted to prove its defense by offering into evidence what it conceded was an incomplete set of undated "sales slips" which appeared to be from a REDKEN distributor, but which did not designate to whom the sales were supposed to have been made. Counsel for LEVIN attempted to introduce the "sales slips" into evidence through the testimony of Herb Levin even though Mr. Levin testified

[3]LEVIN also misstated the Record in LEVIN's appeal to the Sixth Circuit. REDKEN has attached an appendix (Appendix III) which points out LEVIN's misstatements and statements of "facts" in the Petition which have no support in the Record and has included as a part of Appendix III, the similar Appendix it filed in the Sixth Circuit.

that he had not been involved in the day to day operation of his two stores for several years.

The District Court questioned LEVIN's counsel regarding where and from whom he had obtained the "sales slips". LEVIN's counsel responded that he had received them from the managers of LEVIN's Oak Park and West Bloomfield stores and that they had indicated that the "sales slips" were their most recent invoices which included their purchases of REDKEN products, but that not all of the "sales slips" for REDKEN products for any period of time were included because "that was all they were able to locate because of the thousands of invoices that they carry. They just do not — they don't save them all. They looked at their records and those were the most recent ones they had." Neither of the managers testified at the Show Cause Hearing.[4]

The "sales slips" were not admitted into evidence. In the Petition, LEVIN argues the District Court's refusal to admit those documents into evidence was in error and, thus, LEVIN was denied due process.

Because LEVIN did not identify the REDKEN distributors it claimed were negligent, REDKEN could not bring the allegedly negligent REDKEN distributors into court. REDKEN could only introduce into evidence its current form of Distributor Agreement and Professional Services Policy Statement (the "REDKEN Documents") to show the effect of such negligence on a distributor. See Appendix IV. The REDKEN Documents were admitted into evidence over the objections of LEVIN's counsel.

The Distributor Agreement, in part, states:

> To protect the health and safety of the consuming public and to avoid endangering Redken's valuable good

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[4]LEVIN did submit two Affidavits of the managers which contained hearsay, were not made on personal knowledge and purported to recite the state of mind of third parties. With its Motion for Rehearing, LEVIN even filed an Affidavit by one of the managers as "agent" for the other manager. *See* Appendix VIII.

> will and reputation, many of Redken's products are prepared, formulated, packaged and labeled "For Professional Use Only" and are to be resold solely to salons[5] for their use and application only.

The Distributor Agreement further provides that a distributor of REDKEN products may be terminated if the distributor violates the terms of the agreement and sells "For Professional Use Only" products to any purchaser not a SALON. Robert Allen, REDKEN's Contract Compliance Manager, testified that if a distributor does violate the agreement by selling REDKEN "For Professional Use Only" products to any purchaser not a SALON that such a distributor is terminated and that he had personal knowledge of nine distributor terminations in the last three years for that reason.

The testimony of Robert Allen and the REDKEN Documents were offered as evidence to rebut LEVIN's argument that REDKEN distributors negligently delivered the "For Professional Use Only" products into LEVIN's two stores. Allen testified that the more probable manner in which LEVIN obtained these products was through the diversion market. A diversion market for REDKEN "For Professional Use Only" products exists and, despite REDKEN's efforts, REDKEN products are distributed in that market through diverters who obtain REDKEN "For Professional Use Only" products from distributors who fail to adhere to their distribution contracts with REDKEN or SALONS that sell REDKEN products out the back door. The diverters then sell the products to retailers such as LEVIN.

REDKEN has a vested interest in eliminating sales of its "For Professional Use Only" products in the diversion market.

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[5] REDKEN considers a "SALON" to be an establishment in which 50% or more of the total revenues received from all sources at each establishment location must at all times be payments for cosmetological and barber services performed by licensed professionals on the establishment premises or at an authorized school of cosmetology or hairstyling duly licensed by a state.

Through that market the public may purchase hair care products which do not suit their needs, which are old and defective, which will cause damage to their hair, or which will not perform adequately. When there is damage to a customer's hair or when a product is ineffective it is REDKEN that is subject to product liability lawsuits and loss of goodwill, not the diverters.

In cross-examining Herb Levin, REDKEN's counsel asked him to identify the REDKEN distributors who supplied his stores with REDKEN products. LEVIN's counsel objected to that inquiry and argued that the line of questioning was irrelevant. The District Court overruled that objection and stated that the question was relevant to LEVIN's defense of inadvertent delivery by REDKEN distributors, but instructed Mr. Levin that he did not have to answer the question, although his answer would assist his defense. Mr. Levin chose not to answer the question or identify the distributors.

On March 25, 1987, the District Court; having reviewed and considered the evidence and briefs submitted by the parties, including the testimony of Robert Allen and Herb Levin; having observed the demeanor of the witnesses and formed an opinion as to the credibility of their testimony; found by clear and convincing evidence that LEVIN had violated the permanent injunction and ordered LEVIN to pay REDKEN an award of $25,000 in damages, plus actual attorneys's fees and costs and expenses associated with bringing the matter before the court; and further ordered LEVIN to post a bond in the amount of $25,000 to the benefit of REDKEN, conditioned upon LEVIN's future compliance with the permanent injunction.

LEVIN appealed that order and on March 29, 1988, after receiving briefs and hearing oral argument, the Sixth Circuit affirmed. 843 F.2d 226. LEVIN petitioned the Sixth Circuit for a rehearing *en banc,* which petition was denied on May 16, 1988. LEVIN filed a Petition for Writ of Certiorari on July 20, 1988.

## REASONS FOR DENYING THE WRIT

In the Petition LEVIN sets forth the same arguments it made to the Sixth Circuit, and attempts a few legal arguments as window dressing for this Court. (Compare Statement of Questions Presented in LEVIN's Briefs to the Sixth Circuit, Appendix V, with those in the Petition.) In essence, LEVIN's contentions are that: (1) the District Court made two incorrect evidentiary rulings at the Show Cause Hearing on March 25, 1987, and (2) the District Court imposed sanctions for LEVIN's second violation of the District Court's permanent injunction which were so excessive that they were an abuse of its discretion. The five questions in the Petition are all variations of these two contentions. As the Sixth Circuit determined, the District Court's evidentiary rulings were correct and the sanctions imposed were not excessive. 843 at F.2d 229-230. The decisions of the District Court and the opinion of the Sixth Circuit are accurate and correct and the result is fair. The opinion of the Sixth Circuit gave full consideration to each issue LEVIN raised there and decided all of them correctly.

### I. NONE OF THE QUESTIONS PRESENTED IN THE PETITION MERITS CONSIDERATION BY THIS COURT.

None of the questions presented in the Petition meets the requirement of Supreme Court Rule 17 governing review on certiorari. The questions presented do not involve: a conflict between the decisions of the federal courts of appeal; any important question of federal law; or any important public question.

Before making its evidentiary rulings and imposing sanctions for contempt the District Court was able to see and hear the witnesses (including Herb Levin) and to question them. The District Court was able to access their truthfulness and their character. On the basis of its observations and assessments the District Court made its evidentiary rulings and imposed its

sanctions. The Sixth Circuit reviewed the Record and affirmed the District Court.

LEVIN now asks this Court to review the Record and determine if the evidentiary rulings of and the sanctions imposed by the District Court should be changed. This Court has stated that such is not the task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson,* 268 U.S. 220, 227 (1925). In the Petition, LEVIN raises only questions turning entirely on the facts of this case and without significant impact outside the limits of this case. Certiorari, therefore, should be denied.

## II. LEVIN HAS RECEIVED DUE PROCESS.

### A. This Action Involves Civil Contempt — Not Criminal Contempt.

Throughout the Petition LEVIN ignores the distinctions between civil and criminal contempt to improve LEVIN's arguments. *See* C. Wright, *Federal Practice and Procedures: Criminal* 2d §704 (1982).

A determination of whether the action involved civil or criminal contempt can be made by looking at the purpose and character of the sanctions and whether the action was maintained by a private litigant as part of the original action or whether the action was maintained by order of the court. *See Gompers* v *Bucks Stove & Range Co.,* 221 U.S. 418, 444-46 (1911); and *United States* v *United Mine Workers,* 330 U.S. 258, 295-304 (1947).[6]

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[6] *United Mine Workers* is a complex case with an unusual fact situation. The United States is the complaining party and the case involves both civil and criminal contempt proceedings. In reading *United Mine Workers* one must be careful to note which sanction this Court is discussing. See C. Wright, *supra* at 821.

When, as in the instant action, contempt proceedings are brought by a private plaintiff as part of the action in which the injunction was issued and the sanctions imposed are designed to aid or compensate the plaintiff the proceeding is one of civil contempt. *Gompers,* 221 U.S. at 448-49; *United Mine Workers,* 330 U.S. at 304; *Latrobe Steel Co.* v *United Steelworkers of America, AFL-CIO,* 545 F.2d 1336, 1344 (3rd Cir. 1976). *See* 843 F.2d at 229-230.

**B. LEVIN Was Served With Notice of the Time, Place and Nature of Show Cause Hearing and Was Given an Opportunity to Respond to REDKEN's Allegations at the Show Cause Hearing.**

In a civil contempt proceeding, due process requires that notice be given of the nature of the allegations and of the time and place of hearing. *American Fletcher Mortgage Co., Inc.* v *Bass,* 688 F.2d 513, 519 (7th Cir. 1982); *United States* v *Powers,* 629 F.2d 619, 625 (9th Cir. 1980); *United States* v *Anderson,* 553 F.2d 1154, 1155 (8th Cir. 1977). LEVIN was served with notice of the nature of the allegations, the relief REDKEN was requesting and of the time and place for the hearing on February 19, 1987, 34 days before the Show Cause Hearing. LEVIN clearly understood the allegations of REDKEN. 843 F.2d at 228-229. At the Show Cause Hearing LEVIN was represented by counsel, called witnesses, offered affidavits, and was allowed to present evidence.[7]

LEVIN's citations to caselaw regarding due process are inapposite because none involves a civil contempt proceeding. Also, LEVIN implies that the level of proof that was required

[7]See Petition at 11a, Appendix E. In denying LEVIN's Motion for Reconsideration, the District Court stated: "In this case a full hearing was conducted in open court on the order to show cause initiated by petitioners [REDKEN]. The court notes that respondents [LEVIN] had ample notice of the purpose of the hearing and ample opportunity to produce witnesses."

to be proven by REDKEN at the Show Cause Hearing on March 27, 1987, was willful conduct, the standard for criminal contempt proceedings. Proof of willfulness may be required in criminal contempt proceedings, but is not required in civil proceedings. *McComb* v *Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949); *In re Jacques,* 761 F.2d 302, 306 (6th Cir. 1985), *cert. denied,* 475 U.S. 1044 (1986) (clear and convincing evidence).

## III. THE EVIDENTIARY RULINGS OF THE DISTRICT COURT WERE CORRECT.

LEVIN argues that because the District Court made evidentiary rulings in REDKEN's favor LEVIN did not receive due process. LEVIN cites *no* authority for that argument or that the District Court's evidentiary rulings were not correct.

LEVIN did not contest Allen's testimony that he had purchased REDKEN "For Professional Use Only" products at both of LEVIN's stores. LEVIN's only defense at the Show Cause Hearing was that the REDKEN "For Professional Use Only" products were on the shelves in the LEVIN stores inadvertently, due to the negligence of REDKEN distributors. LEVIN failed to provide *any evidence that supported this defense.* To establish such a defense LEVIN would have had to convince the District Court of the occurrence of a most improbable series of coincidences.

LEVIN would first have to establish the identity of all of LEVIN's sources for REDKEN products during the relevant period. LEVIN would then have to prove that LEVIN had not ordered any of REDKEN "For Professional Use Only" products from any of those sources. LEVIN would then have to prove that despite LEVIN's failure to order any REDKEN "For Professional Use Only" products from those sources one or more of those sources delivered REDKEN "For Professional Use Only" products to both of LEVIN's stores. Then, despite the fact that the "For Professional Use Only" products are packaged in different containers [plastic bottles instead of

tubes and cartons], in much larger quantities [quarts and pints instead of ounces], and are sold at much different prices; LEVIN would have to prove that the "For Professional Use Only" products were received, unpacked, paid for, individually priced, placed on the shelves, and sold to Robert Allen in both stores and that none of LEVIN's employees noticed that these were not the REDKEN retail products LEVIN had ordered and which LEVIN usually stocked and sold.

Evidentiary rulings by a district court are a matter of discretion and should be upheld on appeal unless the district court abused its discretion. *Cathey* v *Johns-Manville Sales Corp.*, 776 F.2d 1565, 1573 (6th Cir. 1985), *cert. denied,* 106 S.Ct. 335 (1986). The District Court did not abuse its discretion in its evidentiary rulings in this action.

**A. The Incomplete Set of Undated "Sales Slips," Which Did Not Indicate Any Purported Purchaser Was Not Admissible Under Rule 803 of the Federal Rules of Evidence.**

LEVIN failed to establish the foundation necessary to have the "sales slips" admitted as business records under Federal Rule of Evidence 803(6) or to have them considered as evidence in support of the nonoccurrence of an event or the nonexistence of a matter under Federal Rule of Evidence 803(7). See Appendix VI for the text of Rules 803(6) and 803(7).

As the Sixth Circuit held, 843 F.2d at 229, for a business record to be admissible under Rule 803(6) the record must be: (1) made in the course of a regularly conducted business activity, (2) kept in the regular course of that business, (3) recorded as regular practice of the business, (4) and the record must have been made by a person with knowledge or from information transmitted by a person with knowledge. *O'Mally* v *United States Fidelity and Guaranty Co.*, 776 F.2d 494, 499-500 (5th Cir. 1985); *Paddack* v *Dave Christensen, Inc.*, 745 F.2d 1254, 1258 (9th Cir. 1984) (quoting *Clark* v *Los Angeles,* 650 F.2d 1033, 1036-37 (9th Cir. 1981), *cert. denied,* 456 U.S. 927

(1984). Even if a business record meets the formal requirements set forth above, the district court need not admit it into evidence if "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6); *Paddack,* 745 F.2d at 1258.

The "sales slips" offered by LEVIN did not meet any of the foundation requirements set out above and were properly excluded from evidence by the District Court. First, the "sales slips" were undated. Second, the "sales slips" did not indicate the customer to whom the goods were supposed to have been sold. Third, LEVIN did not have an employee of its stores who was in charge of the preparation or custody of the "sales slips" available in court. Fourth, there was no testimony that these "sales slips" were kept in the regular course of business. *See Johnson* v *Lutz,* 253 N.Y. 124, 170 N.E. 571 (1930) (which requires that the person with personal knowledge of the record information have a business duty to transmit it). And finally, and most importantly, LEVIN's counsel admitted that the "sales slips" produced in court were not all of the "sales slips" for any period of time because *"they don't save them all."* After counsel for LEVIN stated that LEVIN does not save all the "sales slips" for its sources of REDKEN products, the "sales slips" offered were not trustworthy evidence that LEVIN had never ordered any REDKEN "For Professional Use Only" products.

The "sales slips" were not admissible as business records and could not prove that LEVIN did not order the REDKEN "For Professional Use Only" products which Robert Allen purchased at LEVIN's two stores. The District Court properly excluded the "sales slips" from evidence and the ruling was not an abuse of discretion. Moreover, because the District Court was the finder of fact even if the "sales slips" had been allowed into evidence the District Court would have properly given them no weight because they were not probative of LEVIN's defense.

**B. The REDKEN Documents Were Properly Admitted Into Evidence Because They Were Relevant to LEVIN's Defense Pursuant to Rule 401 of the Federal Rules of Evidence and They Were Not Unduly Prejudicial Under Rule 403 of the Federal Rules of Evidence.**

LEVIN argued in its appeal to the Sixth Circuit that REDKEN'S current standard Distributor Agreement and Professional Service Policy Statement (the "REDKEN Documents") should have been excluded from evidence under Federal Rule of Evidence 403 because they were prejudicial. "Under Federal Rule of Evidence 403 the admission of allegedly unduly prejudicial evidence is placed within the sound discretion of the trial judge. [Citation omitted] Consequently, a trial judge's ruling will not be overturned unless he has clearly abused his discretion." *Cathey,* 776 F.2d at 1575 (citations omitted). See Appendix VI for the text of Rule 403.

The REDKEN Documents could not have had a prejudicial effect on the jury in this case because there was no jury. In the absence of a jury, Rule 403 has little practical application because a trial judge, trained and experienced in the law, is capable of distinguishing between prejudice and probative value and weighing the evidence accordingly. Further the REDKEN Documents had probative value relative to LEVIN's defense and were not unfairly prejudicial.

The REDKEN Documents were relevant under Rule 401 of the Federal Rules of Evidence. See Appendix VI for the text of Rule 401. The test for relevancy is whether a reasonable man might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence. *United States* v *Brashier,* 548 F.2d 1315, 1325 (9th Cir. 1976) *cert. denied* 429 U.S. 1111 (1977).

The REDKEN Documents were offered by REDKEN to rebut LEVIN's claim that the "For Professional Use Only" products were in LEVIN's stores through inadvertence. The REDKEN Documents were not offered to prove how or why

the REDKEN products got on LEVIN's shelves, but were offered as evidence that it was not probable that a REDKEN distributor inadvertently sold and delivered REDKEN "For Professional Use Only" products to LEVIN in view of the consequences to a distributor of such negligence. The REDKEN Documents also showed the measures REDKEN takes to keep its "For Professional Use Only" products out of the diversion market.

The District Court was correct in allowing the admission of those documents. The affirmance of the District Court's evidentiary rulings by the Sixth Circuit was not in error. 843 F.2d at 229. This Court should not grant the Petition for Writ of Certiorari to review those evidentiary rulings. *See United States* v *Johnson*, 268 U.S. 227 (1925).

## IV. DISTRICT COURT'S SANCTIONS FOR LEVIN'S CONTEMPT WERE PROPER AND IN ACCORD WITH JUDICIAL PRECEDENT.

Sanctions for civil contempt imposed by a trial court should be upheld on appeal unless the court abused its discretion in imposing such sanctions. *Sizzler Family Steak Houses* v *Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1534 n.8 (11th Cir. 1986); *General Signal Corp.* v *Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986); *Northside Realty Associates, Inc.* v *United States*, 605 F.2d 1348, 1356 n.23 (5th Cir. 1979). Sanctions for civil contempt may be used for "either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United Mine Workers*, 330 U.S. at 304.

### A. District Court Properly Awarded REDKEN Damages For LEVIN's Second Violation Of Its Permanent Injunction.

On October 12, 1977, after finding that LEVIN violated the permanent injunction against selling REDKEN "For Professional Use Only" products, the District Court determined

that REDKEN's damages would be $25,000 if LEVIN again violated the terms of the permanent injunction and ordered LEVIN to post a bond in that amount for the benefit of REDKEN.[8] When the District Court granted LEVIN's motion for return of the $25,000 bond in 1978, the Court warned LEVIN that due to LEVIN's egregious past conduct LEVIN could expect to be dealt with very harshly the next time LEVIN violated the terms of the permanent injunction. 843 F.2d at 229-230.

The District Court set forth in advance the penalty that would be imposed for LEVIN's next violation of the permanent injunction and the sanction to be imposed was for the benefit of REDKEN. The District Court determined that such a sanction would, at that time, be the best method of assuring LEVIN's future compliance with the court's order. *Id.* at 230. As the court in *Latrobe Steel Co.*, 545 F.2d at 1344, noted, courts have considerable discretion in imposing sanctions and such discretion allows the court to bring a defiant party into compliance by setting forth in advance the sanctions to be imposed for future violations. In *Latrobe* the court stated:

> [T]he objective of a civil contempt decree is to benefit the complainant. Civil contempt proceedings are instituted primarily on the motion of the plaintiff and are part of the underlying action.

*Id.* at 1343 (emphasis added); *see also Soobzokov* v *CBS Inc.*, 642 F.2d 28, 31 (2d Cir. 1981); *Sizzler Family Steak House*, 793 F.2d at 1536.

In *Sizzler Family Steak House*, the United States Court of Appeals for the Eleventh Circuit upheld a *compensatory award of $25,000* as a sanction for the defendant's *non-willful* violation of a permanent injunction. *See Sizzler*, 793 F.2d at 1534-1536. The Eleventh Circuit noted that the sanction was "modest." *Id.* at 1535.

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[8] LEVIN had stipulated that REDKEN had suffered actual damages of not less than $100,000. *See* p. 3 *supra* and Appendix I, ¶ 11 at 5b.

### B. District Court Properly Imposed Sanctions Against LEVIN To Attempt To Assure LEVIN's Future Compliance With Its Order

The District Court ordered LEVIN to post a $25,000 bond to the benefit of REDKEN, conditioned upon LEVIN's future adherence to the permanent injunction, the same bond that the District Court ordered LEVIN to post for the benefit of REDKEN in 1977. A court may order sanctions to compel obedience to a court order. *TWM Manufacturing Co.* v *Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983), *cert. denied*, 107 S.Ct. 183 (1986). And the "court has broad discretion to design a remedy that will bring about compliance." *Perfect Fit Industries, Inc.* v *Acme Quilting Co.*, 673 F.2d 53, 57 (2nd Cir. 1982), *cert. denied* 459 U.S. 832 (1982); *see also Sizzler*, 793 F.2d at 1534 n.8; *Latrobe*, 545 F.2d at 1344.

Because the $25,000 sanction imposed by the District Court was an approximation of the damages that would be sustained by REDKEN in the event of LEVIN violating the injunction[9] (843 F.2d at 230), LEVIN's discussion of the determinations that a court should make before imposing a fine payable to the court are not relevant to this action. *See, United Mine Workers*, 330 U.S. at 304.

## V. LEVIN's UNFOUNDED *ERIE* DOCTRINE ARGUMENT SHOULD NOT BE CONSIDERED BY THIS COURT BECAUSE IT IS CONTRARY TO LAW AND IT WAS NOT RAISED IN LOWER COURTS.

In a transparent effort to invest its Petition, which seeks a factual review of a rather routine civil contempt proceeding, with an appearance of jurisprudential importance, LEVIN for the first time, raises the "*Erie* doctrine." In a convoluted and illogical fashion LEVIN argues that a federal district court imposing sanctions for a violation of its own injunction in a diversity case must apply the state law governing sanctions

[9] *See* n.8 *supra*.

and use the same procedures a state court would use in a similar case. That argument is contrary to law.

Federal courts have the power to punish a party for disobedience or resistance to their lawful orders and decrees, 18 U.S.C. §401, and a federal court may enforce its injunctions in accordance with federal procedures, against parties who "injure another's legislatively protected and registered rights and property." Fed. R. Civ. P. 65. *See also, Waffenschmidt* v *Mackay,* 763 F.2d 711, 716 (5th Cir. 1985) ("Courts possess the inherent authority to enforce their own injunctive decrees"); Fed. R. Civ. P. 11 and 37(b) and cases thereunder.

Further, this question was not raised or considered in the courts below. See Appendix V. If "issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v *Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *see also, Delta* v *August,* 450 U.S. 346, 362 (1981). This court should not grant the Petition for Writ of Certiorari to review this absurd question.

## VI. SIXTH CIRCUIT OPINION DOES NOT OMIT ANY RELEVANT PORTIONS OF THE RECORD OR INCORRECTLY STATE THE RECORD.

In part IV of the Petition LEVIN argues the Sixth Circuit opinion omits statements of material facts and states facts not of Record. Those arguments are unfounded.

The first paragraph under part IV of the Petition is irrelevant. Whether LEVIN had a contractual right to sell REDKEN retail products is not relevant to LEVIN's violation of the permanent injunction.

In the second paragraph of part IV of the Petition LEVIN misrepresents a statement made by the Sixth Circuit in its opinion. The Sixth Circuit noted that REDKEN products were registered under federal trademark laws and that REDKEN could restrict distribution of its products to certain customers. 843 F.2d at 227-228. That statement does not mean

or imply that the Complaint in this action involved a claim of trademark infringement as LEVIN asserts in the Petition at 15.

LEVIN's third paragraph under part IV is another misstatement of the Sixth Circuit opinion. LEVIN incorrectly states that the Sixth Circuit noted that when the District Court returned the Petitioner's bond in 1979, the District Court stated that REDKEN had "reasonable concerns that they could be exposed to potential liability with the possible misuse of the product by nonprofessionals." 843 F.2d at 228. The Sixth Circuit's statement was made regarding the District Court's finding in 1977, that LEVIN had violated the permanent injunction, and that statement was made by the District Court in 1977, not 1979. See *Id.* and Appendix VII, Transcript, 1977.

Paragraphs four, five and six of LEVIN's Petition at part IV discuss omissions of some facts in the Record from the Sixth Circuit's opinion. LEVIN should consider the possibility that the omissions were intentional because the Sixth Circuit deemed those facts to be irrelevant to its opinion.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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Dated: August 17, 1988

# APPENDIX

## APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REDKEN LABORATORIES, INC.,

Plaintiff

v.

HERB LEVIN, dba LEVIN BEAUTY SUPPLY,

Defendant

Civil Action No. [7]671406

### COMPLAINT

### FIRST CLAIM

(Unfair Competition)

1. Plaintiff Redken Laboratories, Inc., ("Redken") is a corporation existing under the laws of the State of California, having its principal place of business at Van Nuys, California.

2. Redken is and at all times herein pertinent was engaged in the development and manufacturer of various hair coloring, hair care and hair conditioning products which bear Redken's trademarks, some of which are explicitly formulated, designed and labeled for "For Professional Use Only" (hereinafter "Professional Use Only" products).

3. Defendant Herb Levin is an individual residing in the State of Michigan and is doing business under the name of Levin Beauty Supply, having his principal place of business in Oak Park, Michigan, where he sells various hair coloring, hair care, and hair conditioning products, including Redken's Professional Use Only products, to the general public.

4. Jurisdiction of this Court is based upon diversity of citizenship; the amount in controversy is in excess of $10,000, exclusive of interest and costs, as provided in 28 U.S.C. §1332.

5. Redken has expended substantial amounts of effort and money in advertising and otherwise developing and promoting its products. As a result of such effort and expenditure Redken has developed valuable goodwill and a wide reputation as a manufacturer of quality professional products available from professional beauticians and barbers. But for such goodwill and reputation, Redken would not enjoy the patronage for its products of said professional beauticians and barbers. As a part of Redken's efforts to develop and promote its products, Redken spends substantial amounts of money and time educating and training professional beauticians and barbers in the selection and application of Redken products. Because of this education and training, professional beauticians and barbers are able to select and apply the particular Redken products which are most appropriate for each particular consumer's unique hair care needs, and the satisfactory results obtained thereby greatly enhance Redken's goodwill and good name. Redken's ability to compete effectively in its industry and to serve the needs of its customers and the ultimate customers of its products depends on the maintenance of such goodwill and good name.

6. Redken's Professional Use Only products are formulated, designed and labeled solely for resale to and application by licensed professional beauticians and barbers ("professionals"). Redken Professional Use Only products, in order to be free from potential for harm to the consumer and to create desired results, are designed and formulated for application by professionals relying on training, education, and instructions on the application of the products. The non-professional application of those products poses a threat to the health and safety of consumers and creates the danger of physical and emotional harm due to damage to the consumer's hair and scalp. In

addition to the potential for physical and emotional injury said products are ineffective or deleterious when administered to other than a specific type of hair in connection with a specific type of hair care problem. All Redken Professional Use Only products are so labeled because their application by non-professional persons is likely to be less efficacious than professional application. By reason of the aforesaid, defendant's sales of Redken Professional Use Only products to the general public will, if not restrained, cause Redken to suffer undue products liability exposure and refund claim experience, will jeopardize the continued purchase of Redken products by those professional beauticians and barbers who have spent a substantial amount of their own time and money in obtaining the education necessary to properly select and apply Redken's Professional Use Only products, will diminish the patronage of consumers who have rightfully come to expect to obtain safe and efficacious results from Redken products, and will otherwise endanger Redken's goodwill and reputation.

7. Redken Professional Use Only products, which are formulated, designed and labeled solely for use and application by licensed professionals, do not bear the labels and instructions required by the Federal Fair Packing and Labeling Act, 15 U.S.C. §1451, *et seq.,* and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301, *et seq.,* for products which are sold to the general public. Defendant's sale of these products to the general public without the labels and instructions required by such legislation is unlawful. Defendant's sale of Redken Professional Use Only products which contain coal-tar dyes to the general public renders such products adulterated pursuant to the Food, Drug and Cosmetic Act and makes them subject to seizure by the Food and Drug Administration. Defendant's sale of Redken's other Professional Use Only products to the general public renders such products misbranded pursuant to the Fair Packaging and Labeling Act and makes them subject to seizure by the Food and Drug Administration. By reason of

the aforesaid, defendant's sales of Redken Professional Use Only products to the general public will, if not restrained, subject such products to seizure by the Food and Drug Administration, and the publicity attended upon any such seizure or other proceeding by the Food and Drug Administration will severely affect the public's confidence in the quality, safety and efficacy of Redken's products and will otherwise endanger Redken's goodwill and reputation.

8. Redken also manufacturers and distributes a line of retail products which are ultimately resold to the consuming public. These retail products, particularly when accompanied by professional advice, can be safely and efficaciously used by the consuming public, and the general public has developed a reliance on the Redken name as an assurance that any Redken products available for purchase are safe and effective. Defendant, by making Redken's Professional Use Only products available for sale to the general public, is deceiving the public into believing erroneously that said products are as safe and efficacious for non-professional application as Redken's retail line of products. Redken is informed and believes, and on the basis of such information and belief alleges, that defendant is intentionally making Redken's Professional Use Only products available to the general public for the sole purpose of obtaining an immediate profit by trading on Redken's good name and reputation, and in reckless disregard of the resulting injury to Redken's goodwill and reputation and the potentially adverse results to the consumers of those products.

9. As a result of defendant's sale of Redken Professional Use Only products to the general public, in contravention of the purpose for which they are formulated, designed and labeled, Redken has suffered and continues to suffer undue products liability exposure, refund claim experience, diminished patronage of consumers, professional beauticians and barbers and beauty supply dealers, and damage to its professional goodwill and reputation.

10. By causing Redken Professional Use Only products to be sold to the general public defendant is engaged in unfair competition, fraudulent business practices and unfair, deceptive and misleading advertising, in that customers of defendant and the general public are led to believe that said Professional Use Only products are safe and appropriate for non-professional application and use.

11. By reason of the aforesaid acts of unfair competition, fraud and deception, Redken has suffered actual damages in an amount of not less than $100,000.

12. By reason of the intentional, knowing, deliberate, fraudulent and malicious conduct of defendant as aforesaid, Redken is entitled to exemplary damages against defendant in the sum of $300,000.

13. Redken is informed and believes and therefore alleges that defendant is threatening to and will attempt to continue to sell Redken Professional Use Only products to the general public unless and until he is enjoined and restrained by this Court.

14. Redken has no adequate remedy at law.

15. Unless defendant is enjoined and restrained from doing or attempting to do the acts above enumerated, Redken will suffer irreparable injury.

16. Due to the intentional nature of defendant's acts as aforesaid and the inadequacy of prospective relief alone, Redken is entitled to an equitable accounting of all profits made by defendant from the sale of Redken Professional Use Only products.

* * * *

## APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REDKEN LABORATORIES, INC.,

Plaintiff,

v.

HERB LEVIN, dba LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,

Defendants,

Civil Action
No. [7]671406
Ralph B. Guy, Jr.

### FINAL JUDGMENT

Based upon the Stipulation re Entry of Final Judgment entered into on May 24, 1977 between plaintiff Redken Laboratories, Inc. and defendants Herb Levin, dba Levin Beauty Supply, and Levin Beauty Supply, Inc., and the facts therein stipulated to, it is hereby concluded that defendants have been engaging in all acts of unfair competition alleged in the First Claim of the complaint on file herein. Therefore, it is hereby ordered:

1. That defendants Herb Levin, individually and doing business as Levin Beauty Supply, and Levin Beauty Supply, Inc., and their agents, servants, employees, and all persons in active concert or participation with them, be and they hereby are, permanently enjoined and restrained from directly or indirectly advertising, offering for sale or selling to any person,

firm or corporation whomsoever any products manufactured by plaintiff Redken Laboratories, Inc. and explicitly formulated, designed and labeled "For Professional Use Only" or any product which bears any of plaintiff's trademarks or any reproduction, counterfeit copy or imitation thereof which are explicitly formulated, designed and labeled "For Professional Use Only", and that no monetary damages be assessed against defendant.

2. That the Second Claim (including breach of contract) and Third Claim (conspiracy to defraud) of the Complaint on file herein be dismissed with prejudice.

3. That the Counterclaims of Defendants on file herein be dismissed with prejudice.

Dated: June 10, 1977.

RALPH B. GUY, JR.
United States District Judge

A TRUE COPY
HENRY R. HANSSEN, Clerk
By Marilyn A. Ereb
Deputy Clerk

(Title of Court and Cause)

STIPULATION RE ENTRY OF FINAL JUDGMENT

IT IS HEREBY STIPULATED by and between Plaintiff Redken Laboratories, Inc. and Defendants Herb Levin, dba Levin Beauty Supply, and Levin Beauty Supply, Inc. by and through their respective attorneys, that for purposes of this action, all facts set forth in the First Claim of the Complaint on file herein are true and correct, that this Court may conclude therefrom that Defendants Herb Levin and Levin Beauty Supply, Inc. have been engaging in all acts of unfair competition alleged in the First Claim of the Complaint on file herein,

and that this Court may enter the Final Judgment, a copy of which is attached hereto as Exhibit "A".

Dated: May , 1977.

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By: /s/ Donald A. Turner

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By: _____
Grady Avant, Jr.

*Attorneys for Plaintiff*

## APPENDIX III

| *PAGE* | *LEVIN'S STATEMENT IN PETITION* | *REDKEN RESPONSE* |
|---|---|---|
| 4 | "Eight years later, Respondent's local distributor and the supplier of Respondents retail goods, without order, shipped some of the prohibited goods to the Petitioner. Unbeknown to the Petitioner, his clerks stocked them on the open shelves with thousands of other products." | No support in the record. No evidence that a REDKEN distributor shipped goods to LEVIN. Only support for the fact that LEVIN did not order the products is the Affidavits of Michael M. Zeldes, as agent for Jeffrey R. Zeldes. See attached Appendix IIIA at 14b. Further, Herb Levin testified he had not been involved in the day-to-day operations of the stores for several years. He would not know if his clerks stocked the shelves with the prohibited product. |
| 4-5 | "The appearance of the prohibited goods was deceptively similar to the retail goods which Petitioner continuously sold the retail product for more than ten years . . ." | This is an argument which LEVIN has made throughout the contempt proceedings and on this appeal. The District Court and the Sixth Circuit had the actual bottles in their possession when they made their decisions and the District Court and the Sixth Circuit obviously did not accept the argument. See also the attached Appendix IIIA at 15b - 17b. |
| 5 | "A response was filed containing side-by-side comparisons of the retail and prohibited products to show the court that their appearances were deceptively similar." | |

| *PAGE* | *LEVIN'S STATEMENT IN PETITION* | *REDKEN RESPONSE* |
|---|---|---|
| 10 | "No consideration was given to Petitioner's strict compliance with the injunction for almost 10 years before the 1987 violation."<br><br>"For nearly ten years, the Petitioner had completely complied with the permanent injunction." | No support in record. See attached Appendix IIIA at 18b and p. 4 n.2 *supra*. |

## APPENDIX IIIA

## LEVIN'S MISSTATEMENTS OF THE RECORD AND STATEMENTS WITHOUT SUPPORT IN THE RECORD AND REDKEN'S RESPONSES

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 2 | "LEVIN'S competitors in the sale of REDKEN'S retail goods include, other specialty shops, drug stores, and beauty salons. (Robert D. Allen TR at 46)." | Citation to Robert Allen's testimony at Show Cause Hearing is inapposite. Allen did not state who competes with LEVIN. (Robert Allen at TR 46). |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 3 | "The only distinction made at the Show Cause Hearing, between the 'Professional' and 'Retail' products, was that of size. (R.78: Response at Exhibits A-C) (Robert D. Allen TR at 26, 53)." | Misstatement of Record. Robert Allen testified that the "retail" and "Professional Use Only Products" differ in size ("Professional Use Only Products" being sold in larger bottles), type of packaging ("Professional Use Only Products" are packaged in bottles and "Retail" product being packaged in tubes and cartons), in the cost involved in purchasing the larger bottles, and in directions placed on the package containing the product. (Robert Allen at TR 26, 47-48, 52-53). |
| 4 | "Redken products are notoriously available to the public at establishments other than beauty salons, including beauty supply stores, drug stores and other stores." | No support in Record. Robert Allen testified that it was his job, as contract compliance manager, to stop sales by establishments other than beauty salons. (Robert Allen at TR 46-47) There is no evidence in the Record as to the availability of REDKEN products at establishments other than beauty salons. |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 4 | "The Court refused Redken's demand that LEVIN be enjoined from selling REDKEN'S 'Retail' products. (Grady Avant TR at 70)." | Misstatement of Record. Grady Avant stated at the Show Cause Hearing that REDKEN complained of not only sales of "For Professional Use Only" products but also of the "Retail" sales by LEVIN, however, Judge Guy didn't enjoin LEVIN from selling REDKEN'S "Retail" line. (Grady Avant at TR 70). The reason Judge Guy did not enjoin LEVIN from selling REDKEN'S 'Retail' line was because that was not part of the stipulated Order. (R.59: Final Judgment and Stipulation of REDKEN and LEVIN). The District Court never *refused* to order such an injuction. |
| 5 | "After the 1976 lawsuit LEVIN continued to sell REDKEN'S 'Retail' products with only a single mishap in 1977. (R.63: Opinion and Order)." | No support in Record. LEVIN'S citation to Judge Guy's September 27, 1977 Opinion and Order finding LEVIN in contempt of the permanent injunction is inapposite. |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 5-6 | "In January, 1987, the Beaute' Craft Supply Company of Troy, Michigan, an independent distributor of REDKEN and other major brand products, was LEVIN'S supplier of REDKIN'S [sic] 'Retail' products. At or about this time, without orders from LEVIN or his store managers, Beaute' Craft included REDKEN goods marked 'For Professional Use Only' in LEVIN'S orders for REDKEN'S 'Retail' goods. (R.87: Motion for Rehearing at Affidavits of Michael M. Zeldes and Jeffrey Zeldes at p.2 of each) (Levin TR at 63, 64) (R.108: Beaute' Craft invoices)." | No support in Record and citations are inapposite. The Beaute Craft "sales slips" were not admitted into evidence by the District Court because there was no foundation for the admission of the "sales slips." (See generally at TR 63-70 70). Even if the Beaute' Craft "sales slips" had been admitted into evidence they could not prove that the Redken "For Professional Use Only" products were somehow on LEVIN'S two store shelves inadvertently or that Beaute' Craft delivered the goods to LEVIN'S two stores.<br><br>Herb Levin testified that he had not been involved in the day-to-day operation of LEVIN'S two stores. (Herb Levin at TR 61-64). He was not a witness qualified to testify regarding from whom LEVIN obtained REDKEN products. He obviously could not testify that Beaute' Craft inadvertently included REDKEN "For Professional Use Only" products in LEVIN'S orders for REDKEN products. |

| PAGE | QUOTE | RESPONSE |
|---|---|---|
| | | The affidavits of Michael M. Zeldes and Jeffrey Zeldes that LEVIN attached to LEVIN'S motion for rehearing are equally ridiculous. First, the affidavit of Jeffery Zeldes is not his affidavit at all, but rather the *"AFFIDAVIT OF MICHAEL M. ZELDES AS AGENT FOR JEFFREY R. ZELDES."* (Emphasis added.) Second, the statements made by Michael M. Zeldes in his affidavit are unsupported arguments. If one believes his affidavits, Michael Zeldes has an amazing ability to swear not only to his own knowledge and information, but also to what Beaute' Craft Supply Company was aware of regarding the operation of LEVIN'S stores and to what items Beaute Craft supplied to LEVIN'S stores. Michael Zeldes can even swear whether any of his employees were aware that the Redken "For Professional Use Only" products were in LEVIN'S two stores. Indeed, Michael Zeldes is a man for all affidavits. (R.87: Motion for Rehearing, Affidavit of Michael M. Zeldes as Agent for Jeffrey R. Zeldes and Affidavit of Michael M. Zeldes). |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 6 | "After the goods were received, LEVIN'S clerks placed them on the open shelves of LEVIN'S two stores. (R.78: Response to Order to Show Cause at Affidavits of Michael M. Zeldes and Jeffery Zeldes at p.2 of each; at Exhibits A-C) (Robert D. Allen TR at 26 and 53)." | No support in Record. Citations to Record inapposite and lend no support to statement. |
| 8 | "The Response also included side-by-side photographs of REDKEN'S 'Retail' and 'Professional' goods to apprise the Court of the deceptive similarity between the goods. (R.78: Response to Order to Show Cause)." | LEVIN'S Response to the Order to Show Cause did include photographs of REDKEN'S "Retail" and "For Professional Use Only" products, however, the statement that the two goods are deceptively similar is argument and has no support in the Record. |
| 6 | "Moreover, they were deceptively similar to REDKEN'S 'Retail' goods, there being identical names, trademarks, tradedress, container styles, and imprinted instructions on the containers of the 'Professional' and 'Retail' goods." | The REDKEN "For Professional Use Only" products are available in large bottles; whereas, the REDKEN "Retail" products are normally available in smaller cartons and tubes. (Robert Allen at TR 25-26). |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| | | Further, REDKEN "For Professional Use Only" products do not contain descriptions of the ingredients contained in the products and, therefore, do not comply with the Fair Packaging and Labeling Act [15 U.S.C. §1451 *et. seq.*] and the Food, Drug and Cosmetic Act, [21 U.S.C. §301 *et. seq.*] for sale to the general public. (R. 108: Exhibit I, Redken Distributor Agreement at 3). (R. 59: Final Judgment and Stipulation of Redken and Levin); (R.1: Complaint at 3-4). |
| 11 | "Moreover, some consideration should have been given to the circumstances which gave rise to the contempt, including the deceptively similar appearances of REDKEN'S 'Retail' and 'Professional' goods . . ." | Also, the REDKEN "For Professional Use Only" products purchased by Robert Allen and the corresponding REDKEN "Retail" version of the products were available at the Show Cause Hearing. (Robert Allen at TR at 25-27). Judge Hackett was given an opportunity to |

| *PAGE* | *QUOTE* | *RESPONSE* |
| --- | --- | --- |
| | | view the two versions of the products and did not find the products deceptively similar. REDKEN submits that personal viewing of the packaging of the two versions of the products is more enlightening that the photographs which were submitted in LEVIN'S Response to the Order to Show Cause. As every fisherman knows, photographs may be taken in a manner which may make the packaging and the sizes of products appear larger then they actually are. |
| 8 | "REDKEN documents were admitted which attacked LEVIN'S credibility by misrepresenting to the Court that the goods at issue were procured from the 'diversionary market' (Robert D. Allen TR at 30-37 and 45) rather than the REDKEN distributor which, in fact, supplied the goods . . ." | No support in the Record for the pejorative statement that REDKEN "misrepresented" anything to the Court. No support in Record for argument that a REDKEN distributor supplied the REDKEN "For Professional Use Only" products purchased by Robert Allen. |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 11 | "and the inclusion by REDKEN'S distributor, Beaute' Craft, of the prohibited goods, without order, in the 'Retail' goods supplied to LEVIN." | |
| 10 | "Except for the mishap in 1977 (R.63: Opinion and Order Setting Bond) (Avant TR at 7) there was total compliance with the injunction for almost 10 years after its entry." | No support in Record. In fact, Robert Allen testified that he was sent to Detroit to check for sales of REDKEN "For Professional Use Only" products at LEVIN'S two stores because REDKEN had received complaints from Detroit area beauty salons that LEVIN was selling such products. (Robert Allen at TR 19). A permissible inference from this testimony is that LEVIN had been selling the REDKEN "For Professional Use Only" product for an extended period of time because Allen found LEVIN to be selling such products when he came to Detroit. |
| 11 | "In determining whether sanctions were required to coerce LEVIN to comply with the injunction, the fact that the injunction was not violated over a ten year period should have been weighed heavily in favor of LEVIN." | |

| *PAGE* | *QUOTE* | *RESPONSE* |
|---|---|---|
| 11 | "LEVIN'S difficulties in defending himself were compounded on the day of the hearing by the failure of the Court to locate in the file or recall the content of LEVIN'S Response to REDKEN'S Petition for the Order to Show Cause which contained Affidavits of LEVIN'S managers and the side-by-side photographs of REDKEN'S 'Retail' and 'Professional' goods. (Hackett TR at 5)." | Misstatement of the Record. In fact, Judge Hackett took time during the Show Cause Hearing to review LEVIN'S response. (Hackett at TR 12). Judge Hackett stated at the Show Cause Hearing that she had read everything in the Record and had glanced at LEVIN'S response. (Hackett at TR 81). |

## APPENDIX IV

## BEAUTY SUPPLY DISTRIBUTOR AGREEMENT

THIS AGREEMENT is made as of this th day of 198 , by and between Redken Laboratories, Inc. (hereafter "Redken"), having its principal office at 6625 Variel Avenue, Canoga Park, California 91303 and (hereafter "Distributor"), having its principal office at

### RECITALS

A. To ensure that the consuming public will obtain the best possible results from the use of Redken's products, and to enhance Redken's valuable good will and ability to effectively compete in its industry Redken designs its products for use or resale to the consuming public solely by licensed cosmetological and hairstyling establishments whose primary business is the regular offering by licensed professionals of cosmetological or hairstyling services to the consuming public from the establishments' premises which are specially devoted to the performance of such services. This means that 50% or more of the total revenues received from all sources at each establishment location must at all times be payments for cosmetological services performed on the establishment premises. Such establishments and Redken's authorized schools of cosmetology or hairstyling duly licensed by the State are hereafter collectively referred to as "salons". Distributor represents that it is a wholesale beauty supply distributor who will purchase Redken products for resale solely to salons for use by those salons and that Distributor will not sell or otherwise transfer such products to anyone other than salons. Distributor further represents that it will fully perform the wholesale, promotional and educational obligations herein to Redken's satisfaction.

B. To protect the health and safety of the consuming public and to avoid endangering Redken's valuable good will and reputation, many of Redken's products are prepared, formulated,

packaged and labeled "For Professional Use Only" and are to be resold solely to salons for their use and application only.

C. The safe and effective use as well as the successful distribution and sale of all Redken products depends in large part upon the quality and extent of the promotional activity and the inventory controls and distribution system of Redken's distributors as well as upon the educational training program which Redken's distributors impart to salons in accordance with the Redken Scientific Approach to Beauty and Men's Hairstyling. Redken's discount structure is designed to provide Distributor with a sufficient profit margin to enable Distributor to actively promote Redken's products and to properly educate and service the cosmetologists in Distributor's area of primary responsibility. Distributor understands that its representation that it will fully and safisfactorily perform its wholesale, promotional and educational obligations hereunder is a material inducement for Redken's extending the discounts provided for in this Agreement to Distributor and for Redken's appointing Distributor as an authorized Redken distributor. Distributor also understands that the discounts granted to it by Redken are to be repaid to Redken in the event Distributor fails to fully and satisfactorily perform those obligations, and that, in addition to whatever other remedies may be available to Redken, Distributor's failure to fully and satisfactorily perform those obligations will result in the termination of this Agreement pursuant to the provisions of paragraph 14.

NOW, THEREFORE, in reliance on the foregoing recitals and subject to the following terms and conditions, Redken and Distributor agree as follows:

1. Appointment and Products

Redken hereby appoints Distributor as an authorized, non-exclusive Redken Distributor for the Redken products which are listed on Exhibits "A" and "C" attached hereto (the products listed on Exhibits "A" and "C" are hereafter sometimes collectively referred to as the "Redken Products"). Redken, at

any time may make additions to or deletions from the above mentioned list of Redken Products and may make alterations, changes or modifications to the Redken Products described therein without otherwise affecting the terms of this Agreement and without incurring any responsibility or liability to Distributor.

2. Dilution, Adulteration, Repackaging

Except with the express prior written approval and consent of Redken, Distributor shall not dilute, adulterate or repackage any Redken Products and will not obliterate or in any way deface any markings on such Products or their packages or containers.

3. Distributor's Area of Primary Responsibility

Distributor's area of primary responsibility for the distribution of the Redken Products shall be as specified in Exhibit "B," which is attached hereto, an area which Distributor agrees that it can effectively service with its route salesmen and educational personnel.

4. Limitations on Product Distribution

(a) Products which are listed on Exhibit "A," attached hereto, are prepared, formulated, packaged and labeled for sale to the consuming public solely by salons. Distributor fully understands and agrees that it is desirable that such products be resold to the consuming public solely by salons in order to insure that the consuming public will obtain the most efficacious results possible from the use of Redken's products, and in order to enhance Redken's good will and ability to effectively compete in its industry. Distributor represents that it will sell the products which are listed on Exhibit "A" to salons solely for their use and resale to the consuming public, and that it will not sell or otherwise transfer such products to anyone other than salons. In reliance on said representations, Redken will sell such products to Distributor pursuant to the terms hereof.

(b) The products which are listed on Exhibit "C," attached

hereto, are prepared, formulated, packaged and labeled "For Professional Use Only." Distributor expressly recognizes and understands that said Products are not labeled in conformity with the provisions of and regulations promulgated pursuant to the Fair Packaging and Labeling Act and that sale of these "For Professional Use Only" Products to the consuming public violates both the Fair Packaging and Labeling Act and the Food, Drug and Cosmetic Act and is unlawful. Distributor represents that it will sell such "For Professional Use Only" Products solely to salons for their use and application only and, in reliance on said representation, Redken will sell such "For Professional Use Only" Products to Distributor pursuant to the terms hereof.

5. Orders

All orders of any quantity shall be subject to approval and acceptance by Redken and Redken reserves the right for any reason and in its sole discretion to accept or reject, in whole or in part, any or all orders placed by Distributor, or to accept, in whole or in part, such orders on cash in advance or C.O.D. terms or on whatever other terms Redken deems advisable. Distributor will, upon request, submit to Redken financial statements acceptable to Redken to assist Redken in determining, from time to time, the credit terms, if any, on which Redken Products will be sold to Distributor and in establishing appropriate credit limits. Distributor may elect to use its normal purchase order forms in placing its orders with Redken hereunder, provided, however, that any forms used by Distributor shall be used for convenience only and any terms of provisions which may be contained in said forms, other than a description of the Redken Products which Distributor is offering to purchase, shall have no force or effect whatsoever between the parties hereto.

6. Terms of Sale and Shipment

All sales to Distributor shall be in accordance with Redken's then current policy and procedure sheet as it may be changed

from time to time by Redken pursuant to paragraph 12 hereof. Redken Products may be shipped from Redken's plant or other warehouse point employed by Redken for distribution of its products. Redken shall invoice Distributor upon shipment of Redken Products and subject to paragraph 5 hereof, payment shall be due within 45 days of date of invoice. A two percent (2%) cash discount will be allowed on all invoices which are paid within 45 days of date of invoice. A service charge in the amount set forth in Redken's then current policy and procedure sheet, as the same may be changed from time to time by Redken pursuant to paragraph 12 hereof, or the maximum rate allowed by law, whichever is less, shall be paid on all past due amounts, provided, however, that the rate of the service charge shall not exceed one and one half percent (1 1/2%) per month. Distributor's failure to pay all amounts owed to Redken in full when and as due shall constitute a breach hereof and, in addition to whatever other remedies may be available to Redken, including termination pursuant to paragraph 14 hereof, shall give Redken the right, in its discretion, to suspend further shipments to Distributor, to make further shipments only after all prior orders have been paid in full, and to make further shipments only on cash in advance or C.O.D. terms or on whatever other terms Redken deems advisable.

7. Discounts and Distributor's Wholesale, Promotional and Educational Obligations.

(a) Unless changed pursuant to the provisions of paragraph 12 hereof, Redken will grant Distributor a 20% discount from Redken's then current suggested salon prices on Redken Products as a wholesale trade discount. This 20% discount will be granted only if Distributor engages in central receiving, warehousing, shipping, credit extension, billing and other special activities commonly associated with standard full service wholesale practice in the beauty and barber supply industry, and is to be repaid to Redken in the event Distributor fails to

fully and satisfactorily perform such activities.

(b) Unless changed pursuant to the provisions of paragraph 12 hereof, Redken will grant Distributor an additional 20% discount from Redken's then current suggested salon prices as a discount designed to provide Distributor with a sufficient profit margin to enable Distributor to actively promote Redken products and to properly educate and service the cosmetologists in Distributor's area of primary responsibility. This additional 20% discount will be granted only if Distributor performs the following additional educational and promotional services, and is to be repaid to Redken in the event Distributor fails to fully and satisfactorily perform the following educational and promotional services:

(i) Distributor shall organize, train and maintain a competent force of route salesmen who shall call, in person, on each licensed cosmetological establishment where licensed professionals offer cosmetological services (hereinafter referred to as "Cosmetological Establishments") within Distributor's area of primary responsibility on a regular basis. This obligation will be considered fulfilled if each route salesman personally makes approximately one hundred (100) calls on Cosmetological Establishments every two to three weeks;

(ii) Distributor shall promptly call upon all sales prospects within Distributor's area of primary responsibility that Redken may furnish to Distributor from time to time;

(iii) Distributor shall make full and effective use of such promotional and selling aids, advertising materials and related items Redken may, in its discretion, furnish Distributor from time to time;

(iv) Distributor shall mail or deliver to each Cosmetological Establishment within Distributor's area of primary responsibility all educational material and promotional and selling aids which Redken may, in its discretion, furnish or make available to Distributor from time to time for distribution to cosmetological establishments;

(v) Distributor shall promote, participate in and cooperate with all educational and promotional programs formulated by Redken, including, but not limited to, Redken salon seminars and The Challenge of Success, and will use whatever efforts may be necessary to assure their success within Distributor's area of primary responsibility;

(vi) Distributor shall promote, participate in and cooperate with all of Redken's distributor and distributor salesmen educational programs and, when requested by Redken, Distributor shall make available to Redken, at Distributor's place of business, all available employees of Distributor engaged in the sale and distribution of Redken Products for the purpose of participating in Redken's training program and for sales and promotional meetings;

(vii) Distributor, upon hiring a new employee who will in any manner represent Distributor in the sale and promotion of Redken Products, shall notify Redken within a reasonable time of such employment and will make arrangements with Redken for said new employee's attendance at a Redken Distributor Salesmen Forum at Distributor's reasonable convenience;

(viii) At Redken's request, Distributor shall promote, participate in and attend Redken-sponsored beauty shows held in Distributor's area of primary responsibility. Distributor shall cooperate with Redken personnel in order to insure that such shows will be a success;

(ix) Distributor shall use its best efforts to develop the full sales potential for Redken Products to cosmetological establishments within Distributor's area of primary responsibility and Distributor shall otherwise engage in an extensive educational and training program and shall use its best efforts to assure that the cosmetologists within its area of primary responsibility are fully and completely informed concerning the use and application of Redken Products.

(c) Distributor will retain records showing all of Distributor's sales and transfers of Redken Products for two years from the date of each such transaction. Distributor shall make such records available for Redken's inspection upon Redken's request at Distributor's regular place of business; provided, however, that Redken will not make more than two such inspections per year. Distributor is free to determine the prices it will charge its customers for Redken Products.

8. New Products Overstock

Distributor may return for credit any Redken Products designated by Redken as new products within ninety (90) days from date of invoice, if, in the opinion of Distributor, such Products are in excess of Distributor's stock requirements, provided that such Products are returned in merchantable condition. Before returning such Products, Distributor shall first request, in writing, authorization from Redken to return such Products which request will specify each Product to be returned. While Redken will not unreasonably withhold its authorization for the return of such Products, Redken will not accept Products returned to it without its prior authorization. After having been so authorized, Distributor shall return such Products as directed by Redken. Upon receipt of the returned Products, Redken shall allow Distributor a credit for the returned Products equal to the full purchase price paid therefor by Distributor. Freight charges for returns made under this paragraph shall be paid as provided for in Redken's then current policy and procedure sheet as it may be changed from time to time by Redken pursuant to paragraph 12 hereof.

9. Regular Line Overstock

During the term of this Agreement, Distributor may return for credit any Redken Products, if, in the opinion of Distributor, such Products are in excess of Distributor's stock requirements, provided that such Products are returned in merchantable condition. Before returning such Products, Distributor shall first request, in writing, authorization from Redken to

return such Products which request shall specify each Product to be returned. While Redken will not unreasonably withhold its authorization for the return of such Products, Redken will not accept Products returned to it without its prior authorization. After having been so authorized, Distributor shall return such Products, freight prepaid, as directed by Redken. Upon receipt of the returned Products, Redken shall allow Distributor a credit for the returned Products in an amount up to eighty (80) percent of the then current distributor deal price for such Products. The exact amount of credit allowed shall be determined by Redken in its sole discretion, and will be based upon the age and condition of the returned Products.

10. Warranty

Redken warrants to Distributor that all Redken Products sold hereunder are manufactured in accordance with Redken's Scientific Approach to Beauty and Men's Hairstyling and are free from defects. Redken stands behind the quality of the Redken Products and its warranty and assumes full responsibility for any Redken Products which may be sold by Redken with defects in their packaging, labeling or compounding. Redken shall allow Distributor a credit for any such defective Redken Products equal to the full purchase price paid therefor by Distributor. So that Redken may isolate and correct any problems which may exist with its Products, however, Redken does require that all claims be made in writing to Redken as soon as possible after any defect is discovered and that Distributor retain the Redken Products on which any claim has been made for at least thirty (30) days pending receipt of instructions from Redken as to their disposition.

11. Insurance

Upon execution of this Agreement and subject to the limitations of this paragraph 11, Distributor shall be covered under Redken's General Liability Insurance Policy as respects products liability coverage as an authorized Distributor of Redken

Products. The insurance coverage is available only with respect to the distribution or sale of Redken Products by Distributor to salons. The insurance coverage is available only on Redken Products purchased by Distributor directly from Redken and does not apply to:

(a) Any express warranty or any distribution or sales for a purpose unauthorized by Redken;

(b) Bodily injury or property damage arising out of any one or more of the following:

(i) any act of the Distributor wich changes the condition of the Redken Products;

(ii) any failure to maintain the Redken Products in merchantable condition;

(iii) any failure to make such inspections, adjustments, tests or servicing as the Distributor has agreed to make or normally undertakes to make in the usual course of business in connection with the distribution or sale of the Redken Products, or

(iv) Redken Products which after distribution or sale by Redken to Distributor are relabeled, adulterated, diluted or used as a container, part or ingredient of any other thing or substance by or for Distributor.

(c) Bodily injury or property damage occurring within Distributor's premises.

12. Certain Changes by Redken

Redken reserves the right, in its sole discretion, to change, at any time and from time to time, its Products, packaging, labeling and promotional material and techniques without notice to Distributor, and its prices, discounts, service charges, terms of sale, credit limits and freight policy upon notice to Distributor, without otherwise affecting the terms of this Agreement and without incurring any responsibility or liability to Distributor.

13. Distributor's Independent Contractor Status — Miscellaneous

(a) Distributor shall be an independent contractor hereunder

and this Agreement does not create in any manner or for any purpose whatsoever an employer-employee or a principal-agent relationship between Redken and Distributor. Distributor is not authorized to enter into Agreements for or on behalf of Redken, create any obligation or responsibility, express or implied, for or on behalf of Redken, accept payment of any obligation due or owed to Redken, accept service for Redken, or bind Redken in any manner or thing whatsoever. Distributor shall not list, print or display Redken's name in any manner as to indicate or imply that there is a principal-agent or an employer-employee relationship between Redken and Distributor. Distributor shall, at its own expense, defend and hold Redken harmless from any claim asserted against Redken as a result of Distributor's alleged acts or omissions.

(b) Distributor agrees not to infringe, harm or in any way diminish Redken's rights in its trademarks and trade names, and Distributor will not use Redken's trademarks or trade names in any manner, including, without limitation, in advertisements, correspondence, displays, designs or posters, without submitting such proposed use to Redken and obtaining prior approval therefor from Redken.

(c) Distributor shall notify Redken in the event any damage, such as, for example, fire or water damage, occurs to any Redken Products while in Distributor's possession or under its control, and, before disposing of any such damaged Redken Products, whether pursuant to the terms of Distributor's insurance policies or otherwise. Distributor shall first remove all Redken trademarks and trade names therefrom.

14. Term and Termination

(a) This Agreement shall remain in full force and effect until July 31, 1987, and shall thereafter be extended automatically for successive periods of one year each unless terminated by either party by written notice given forty-five (45) days prior to the expiration of the initial term or any annual extension thereof, or unless sooner terminated as hereinafter provided.

(b) Either party may terminate this Agreement at any time, with or without cause, by giving sixty (60) days prior written notice of such termination to the other party.

(c) Either party may immediately terminate this Agreement at any time by giving written notice of such termination to the other party, in the event such other party becomes insolvent or institutes or permits to be instituted against it any proceedings seeking its receivership, trusteeship, bankruptcy, reorganization, arrangement, readjustment of debt, assignment for the benefit of creditors or other proceedings under the Federal Bankruptcy Act or as provided by any other insolvency law, state or federal.

(d) Redken may immediately terminate this Agreement by giving written notice of such termination to Distributor if:

(i) Distributor is a sole proprietorship and the owner thereof dies or transfers all or any portion of his interest therein; or

(ii) Distributorship is a partnership and any change occurs in the composition of the partnership; or

(iii) Distributor is a corporation and any change occurs in the controlling interest thereof.

(iv) Distributor, upon Redken's request, fails to permit Redken within ten (10) days of such request to audit all of Distributor's relevant records in the event that Redken at any time during the term hereof has any cause for concern that Distributor is not limiting the distribution of Redken products to salons as required by such paragraph 4 (Distributor may delete any price information from such documentation prior to delivery thereof to Redken).

15. Effect of Termination

(a) Upon termination of this Agreement, for whatever reason:

(i) All amounts owed from Distributor to Redken shall become immediately due;

(ii) Distributor shall not thereafter represent or hold itself out as an authorized Redken Distributor or engage in any

practices which might make it appear that Distributor is still an authorized Redken Distributor;

(iii) Redken reserves the right to repurchase from Distributor and Distributor reserves the right to resell to Redken any or all of the Redken Products then in the possession or under the control of Distributor which are still in merchantable condition. Such repurchase or resale shall be made at the actual price paid for such Redken Products by Distributor, F.O.B. Distributor's principal place of business, less any and all amounts then owing, for whatever reason, from Distributor to Redken. Such right must be exercised by giving written notice of such exercise to the other party within thirty (30) days from the date notice of termination is given pursuant to paragraph 14.

(b) Acceptance of orders by Redken after notice of termination is given pursuant to paragraph 14 shall be separate transactions and shall not operate as a renewal or revival of this Agreement or as a waiver of such termination. Redken reserves the right for any reason and in its sole discretion to accept or reject, in whole or in part, such orders or to accept, in whole or in part, such orders on cash in advance or C.O.D. terms, or on whatever other terms it deems advisable.

16. Compliance with Laws

Distributor agrees to and shall comply with all statutes and regulations governing or otherwise applicable to the sale or distribution of Redken Products, including, but not limited to, federal and state food, drug and cosmetic laws, federal and state antitrust statutes, and federal and state price discrimination and unfair trade practices acts. Distributor shall not knowingly combine with, aid or assist anyone to violate any such statute or regulation.

17. Assignment

This Agreement may not be assigned or otherwise transferred by Distributor without the prior written consent of Redken and any such assignment or transfer without such

prior written consent shall be null and void and of no force or effect whatsoever. This Agreement is executed by Redken in reliance upon the active, substantial and continued personal participation of the present management of Distributor in Distributor's business. Any assignment or transfer of any interest in Distributor's business, directly or indirectly, such as by a sale of all or part of Distributor's assets or by a transfer or sale of stock interest in Distributor, shall be promptly reported to Redken.

18. Severability of Provisions

The invalidity or unenforceability of any term or provision of this Agreement shall in no way impair or affect the remainder thereof, which shall continue in full force and effect.

19. Entire Agreement

This Agreement embodies the entire Agreement and understanding between the parties hereto, is intended as the complete and exclusive statement of the terms of the agreement between the parties hereto and supersedes any prior agreements or understandings between the parties hereto relating to the subject matter hereof. Distributor acknowledges that Redken has not made any representations to Distributor relating to the subject matter hereof other than those which are contained herein. Except as provided in this Agreement, no change in or addition to the terms and conditions contained herein shall be valid as between the parties hereto unless set forth in a writing which is signed by an authorized representative of both parties and which specifically states that it constitutes an amendment to this Agreement.

20. Waiver of Breach

Waiver by either party of a breach of any provision hereof shall not constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.

21. Cost of Suit

If either party brings any action for relief against the other, declaratory or otherwise, the losing party shall pay the suc-

cessful party a reasonable sum for attorneys' fees in such action, but only if the losing party was the party that commenced such action. This paragraph imposes no obligation on the losing party in such action to pay for such fees if the successful party was the party that commenced such action. For purposes of this paragraph, an action shall be deemed to have been commenced by the party that filed the first pleading therein.

22. Notices

Any notice or other communication required or permitted hereunder shall be sufficiently given if sent in writing by registered or certified mail, postage prepaid, to the parties hereto at their respective addresses first above written. Any notice, if so mailed, shall be deemed to have been given when deposited in the United States mail, regardless of when or whether received. Either party may, by written notice, specify a different address for notice purposes.

23. Governing Law

This Agreement shall be construed in accordance with and all disputes herein shall be governed by the laws of the State of California.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

REDKEN LABORATORIES, INC. ("Redken")

_____

John E. Meehan, Chairman of the Board and President

Dated: _____

("Distributor")

_____

Title: _____

_____

Dated: _____

EXHIBIT "A"
List of Redken Products
EXHIBIT "B"
Description of Distributor's Area of Primary Responsibility
EXHIBIT "C"
List of "For Professional Use Only" Products
EXHIBIT "D"
Redken Professional Services Policy Statement

## REDKEN PROFESSIONAL SERVICES POLICY STATEMENT

Redken Laboratories, Inc. (Redken) has, for over 25 years, been designing beauty products only for use in or resale directly to the consuming public by licensed cosmetological establishments. The primary business of these establishments must be the regular offering of cosmetological services by licensed and practising cosmetologists to qualify as Redken salons. This means that 50% or more of the total revenues received from all sources at each establishment location must at all times be payments for cosmetological services performed on the establishment premises. (Such establishments, and Redken's authorized schools of cosmetology are hereinafter referred to as "salons").

This also means that the licensed professionals at salons carrying Redken products must remain current in their profession by regularly performing cosmetological services and by continually maintaining their professional expertise through attendance at Redken and other educational and training events (hereinafter "practising professionals"). The salon patron obtains the safest application and most efficacious results possible when Redken products are sold and applied by such professionals.

This is because the salon patron receives individualized expert beauty advice based upon such professionals' intimate

knowledge of their patrons' ever-changing hair and skin condition at the time that the hair or skin services are being performed and the product prescription is being made. This "composite" of expert professional advice accompanying the application or sale of Redken products is the essence of Redken's business. Redken therefore insists that its products only be sold to and through salons where practising professionals regularly perform services and maintain current their professional expertise.

Some owners of beauty establishments may not have fully perceived (or may, for their own reasons, have chosen to ignore) that one of the greatest benefits which Redken can afford to the consuming public is this "composite" of individualized expert advice accompanying the application and sale of Redken's fine products. Redken has no intention of permitting its good will and reputation to be damaged by those who, for their own profit, would deprive the consuming public of such great benefits.

Accordingly, Redken has not in the past permitted, nor will it in the future permit Redken distributors to sell or transfer Redken products to retail establishments where the regular performance of professional services is only incidental to the primary retail objective of the business. Redken considers that a direct or indirect sale of Redken products to establishments which are not "salons" as defined in this Policy Statement is a material breach of the distributor agreement. Redken distributors shall be held fully responsible for such breaches. In addition, Redken distributors are required to reasonably monitor all of the establishments to which they sell Redken products to ensure that such establishments are salons which are purchasing Redken products only for application or sale directly to the consuming public from the salon premises.

Since this confirmation of Redken's long-standing policy is so beneficial to the consuming public, and, as a result, to you, your Redken salons and Redken, please sign, date and return

to Redken the original of this policy statement and affix the additional copy to your Redken contract. This will confirm that you intend to continue to follow this Redken Professional Services Policy. This policy is, of course, applicable to the Styling Research Company and all other Redken products. We anticipate that this reaffirmation of Redken's policies will, among other things, assist those prospective salon owners who are contemplating designing new retail-oriented salons to do so in conformity with these Redken standards. We therefore encourage you to continue to emphasize to your customers the immense untapped potential for significantly increased retail sales of Redken product within salons meeting these Redken standards. We expect your continued enthusiastic support of this beneficial salon policy and therefore look forward to receiving the signed Policy Statement within 15 days of this date. We would like to thank you in advance for your continued cooperation and support in our mutual efforts to continue to raise the professional standards of our fine industry.

REDKEN LABORATORIES, INC.

_____

John E. Meehan
Chairman of the Board & CEO

Dated: _____

ACCEPTED AND AGREED TO IN FULL:

By: _____
Dated: _____
February 15, 1985
2296F

## APPENDIX V

### STATEMENT OF THE ISSUES

[LEVIN's Brief to Sixth Circuit]

1. Whether The District Court Erred In Imposing Sanctions.

2. Whether The District Court Imposed Excessive Sanctions Contrary To The Governing Case Of United Mine Workers Of America.

3. Whether The District Court Erred In Refusing To Grant Levin The Right To Defend Against Redken's Misrepresentations Regarding The Source Of The Prohibited Goods.

4. Whether The District Court Erred In Giving Weight To Levin's Refusal To Provide An Affidavit Demanded By Redken.

### STATEMENT OF THE ISSUES

[LEVIN's Reply Brief to Sixth Circuit]

1. Whether the District Court Abused Its Discretion in Awarding Redken $25,000.00 Damages, Imposing a $25,000.00 Bond in Favor of Redken and Awarding Redken Actual Attorney's Fees, Expenses and Costs

2. Whether the Court Erred [sic] in its Rulings Which Admitted Redken's Distributor Agreement and Policy Statement into Evidence, Refused to Admit Levin's Invoices into Evidence, and Ruled that Levin's Refusal to Provide a List of Redken Distributors who Supplied Levin Redken products Relevant to His Defense

## APPENDIX VI

FEDERAL RULE OF EVIDENCE 401 PROVIDES:

> Definition of "Relevant Evidence." "Relevant Evidence" means having any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401.

FEDERAL RULE OF EVIDENCE 403 PROVIDES:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

FEDERAL RULE OF EVIDENCE 803(6) PROVIDES:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthioness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed. R. Evid. 803(6).

FEDERAL RULE OF EVIDENCE 803(7) PROVIDES:

Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(7).

## APPENDIX VII

(Title of Court and Cause)

Before Honorable RALPH B. GUY, Jr., United States District Judge, at Detroit, Michigan, on Tuesday, September 27, 1977.

APPEARANCES:

MESSRS. LONG, PRESTON, KINNAIRD & AVANT,
By GRADY AVANT, Jr., Esq., and
LARRY J. STRINGER, Esq.,
4300 City National Bank Building,
Detroit, Michigan 48226,

Appearing on behalf of the Plaintiff.

MESSRS. TURNER & TURNER, P.C.,
By DONALD A. TURNER, Esq.,
24800 Northwestern Highway,
Southfield, Michigan 48075,

Appearing on behalf of the Defendants.

### OPINION AND ORDER

This matter is before the Court on petitioner Redken Laboratories' request for an order to show cause why the respondent and the defendant in the original proceedings, Herb Levin and various business names under which Mr. Levin operates, should not be held in contempt of a June 10th injunction of this Court which in substance enjoined Mr. Levin from selling at retail any Redken Laboratory products which were designated "For Professional Use Only."

* * * *

With that in mind, the Court makes the following findings of fact:

First, that on June 10, 1977, an injunction and final judgment issued from this Court in the matter of Redken Laboratories v. Herb Levin, et al, Civil Action No. [7]6-71406; that

that injunction, among other things, prohibited Mr. Levin and his business entities from selling Redken "Professional Use Only" products at retail to the general public.

Secondly, the Court finds that the petitioner Redken Laboratories has a legitimate interest in enforcing and seeking to police such injunctions on the basis of business reasons as well as potential liability reasons with the possibility of misuse of the product by other than professionals.

* * * *

## APPENDIX VIII

(Title of Court and Cause)

### AFFIDAVIT OF MICHAEL M. ZELDES AS AGENT FOR JEFFREY R. ZELDES

STATE OF MICHIGAN )
) SS
COUNTY OF OAKLAND )

Michael M. Zeldes, being duly sworn, deposes and says:

1. That I make this affidavit as agent for Jeffrey R. Zeldes.

2. That the reason why this Affidavit is not made by Jeffrey R. Zeldes as principal is that Jeffrey R. Zeldes is out of the state, is not expected to return until April 9, 1987 and that this Affidavit is in support of a Motion for Reconsideration which must be served not later than April 8, 1987.

3. That Jeffrey R. Zeldes has managed the Levins of West Bloomfield, Inc. store at 6716 Orchard Lake Road, West Bloomfield, Michigan since 1985.

4. That since 1985, Herb Levin has not been involved in the management of the store.

5. That during the time Jeffrey R. Zeldes has managed the store, only the retail line of Redken hair products has been

sold or offered for sale at the store; that the retail line of Redken products were supplied by a Redken distributor, Beaute' Craft Supply Company, 600 West Maple Road, Troy, Michigan 48099; and that the "For Professional Use Only" Redken products were never knowingly offered for sale at the store.

6. That Beaute' Craft Supply Company has always been aware that the Levins of West Bloomfield store is not a beauty salon; that Beaute' Craft Supply Company has always been aware that the Levins of West Bloomfield store is a retailer of beauty and health care products and that Beaute' Craft Supply Company has always been aware the Redken retail products are for re-sale at the Levins of West Bloomfield store to the general public.

7. That orders for health and beauty products at the Levins of West Bloomfield store are placed only by Jeffrey R. Zeldes; that Jeffrey R. Zeldes has never ordered "For Professional Use Only" Redken products from a Redken distributor; that the "For Professional Use Only" Redken products which were purchased by Redken at the Levins of West Bloomfield store were not ordered from the Redken distributor; that the "For Professional Use Only" Redken products were supplied by the Redken distributor without the knowledge of Jeffrey R. Zeldes; and that neither Jeffrey R. Zeldes nor his employees were aware that they were in the store.

8. That the trade dress of the packages of the "For Professional Use Only" is deceptively similar to the Redken retail products and that the "For Professional Use Only" Redken products were mistakenly placed by Jeffrey R. Zeldes' employees on the shelves of the Levins of West Bloomfield store.

9. That until the Order to Show Cause was brought to the attention of Jeffrey R. Zeldes, neither Jeffrey R. Zeldes nor any of his employees were aware that "For Professional Use Only" Redken products were supplied by Beaute' Craft and for sale at the Levins of West Bloomfield store.

10. That this Affidavit was reviewed with Jeffrey R. Zeldes

by telephone on April 6, 1987, who stated that the facts attested to are true, and consent was obtained for the Deponent to make the Affidavit as agent for Jeffrey R. Zeldes.

Further deponent sayeth not.

---

Michael M. Zeldes, Deponent,
acting as Agent for Jeffrey R.
Zeldes, Principal

Subscribed and sworn to before
me this 6th day of April, 1987

---

Carmelina Mullane, Notary Public
Oakland County, Michigan
My commission expires: May 2, 1989